JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*.

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*.

JURISDICTIONAL STATEMENT

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

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JURISDICTIONAL STATEMENT

Southern Railway Company and The Cincinnati, New Orleans and Texas Pacific Railway Company, appellants, submit this statement, pursuant to Rules 13 and 15 of the Supreme Court of the United States, as revised, to show that this Court has jurisdiction of this appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the United States District Court for the Eastern District of Virginia is not yet reported. A copy is attached as Appendix A. The decision of the Interstate Commerce Commission (Division 2) is

reported in 298 I.C.C. 439, and a copy is attached hereto as Appendix B. Also attached, as Appendix C, is copy of the order of the Commission, dated May 4, 1956, made pursuant to the Commission's decision.

The District Court entered no findings of fact or conclusions of law apart from its opinion.

JURISDICTION

This suit was brought by appellants under 28 U.S.C 1336 to set aside in part an order of the Interstate Commerce Commission. Trial was held before a three-judge Court convened under 28 U.S.C. 2284 and 2325. The judgment of the District Court dismissing the complaint was entered on July 12, 1957, and notice of appeal was filed in that Court by appellants on August 29, 1957.

The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. 1253 and 2101(b). The following decisions sustain the jurisdiction of this Court to review the judgment on direct appeal in this case: *Thompson v. United States,* 343 U.S. 549, 554 (1952) and *Dixie Carriers* v. *United States,* 351 U.S. 56, 58 (1956).

QUESTIONS PRESENTED

The questions presented relate to that part of the Commission's order of May 4, 1956 (See third ordering paragraph in No. 31737, Appendix C),* requiring The

* This paragraph reads as follows:

"*It is further ordered,* That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner pre-

Cincinnati, New Orleans and Texas Pacific Railway Company (CNO&TP), an affiliate of Southern Railway Company (Southern), to establish reciprocal switching on all traffic between connections with other railroads at Chattanooga, Tenn., on the one hand, and industries in Boyce, Tenn., on the other. They arise from a decision of the Interstate Commerce Commission (Division 2) of that date (set forth in Appendix B), reconsideration of which was denied by an order of the Commission, dated October 1, 1956. That decision was made in a consolidated proceeding involving the prescription of rates on rutile ore from South Atlantic and Gulf ports to Chattanooga and Boyce, Tenn. (such prescription of rates not being attacked by appellants), and a requirement, sought by complaint of Cramet, Incorporated, that CNO&TP perform reciprocal switching between points of connection with other railroads in Chattanooga, on the one hand, and industries on its track known as the River track in Boyce beyond the Chattanooga city limits, on the other hand. The reciprocal switching requirement is the only part of the order challenged by appellants in its complaint in the Court below and on appeal to this Court.

The basic question is whether the Commission and the lower Court have misconstrued the Interstate Commerce Act, particularly sections 1 and 15(4), in hold-

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scribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

ing that it was within the Commission's authority to require reciprocal switching as just described and whether its requirement is adequately supported by findings of fact and evidence in support thereof.

Appellants rely upon the questions set forth in their notice of appeal. These questions may be restated and condensed as follows:

(1) Was it error of law for the Court and the Commission to hold that the Commission had authority, without complying with the short-hauling limitations of section 15(4) of the Interstate Commerce Act (49 U.S.C. 15(4)), to require CNO&TP, a Southern Railway System line, to perform the switching of *all* carload traffic from physical connections with other railroads in Chattanooga, Tenn., over its line to industries on its River track in Boyce, Tenn., beyond the Chattanooga city limits, and in the reverse direction, when such haul would be performed by the CNO&TP as merely the switching *agent* for such other line-haul carrier and CNO&TP would be deprived of its haul as a *principal* line-haul carrier, and thus be short hauled, under existing joint through rates in which it participates as an independent carrier and under which it is entitled to divisions?

(2) Did the Court and the Commission err in disregarding the fact that on June 23, 1954, prior to the proceeding here involved, reciprocal switching had by proper tariffs actually been cancelled over the CNO&TP line between connections with other railroads and industries on the River track in Boyce on all carload traffic and that the only routes to or from such industries were those over which CNO&TP was a carrier in its own right under joint rates participated in by it and was entitled to its haul between such points un-

less lawfully required pursuant to the short-hauling provisions of section 15(4) to surrender such haul?

(3) Did the Court misconstrue the statute in assuming that there was *suspension* by the Commission of cancellation of reciprocal switching provided for in the CNO&TP tariff in respect to industries in Boyce and that the burden of proof was, therefore, upon appellants to justify such cancellation, when actual cancellation had already been effected on June 23, 1954, of reciprocal switching on *all carload traffic* not only *to* but *from* such industries?

(4) Was it error of law for the Court, in the absence of any findings by the Commission of unlawful discrimination or undue preference or prejudice, or of higher rates to or from Boyce than to or from Chattanooga, to hold that the Commission's order could be sustained under section 1 of the Interstate Commerce Act, or any other section thereof, in requiring CNO&TP to convert itself from an independent carrier performing a haul between points of connection with other carriers in Chattanooga and industries on the River track in Boyce to a mere switching agent for such other carriers which would themselves perform the haul through such agency?

(5) Were the Commission's ultimate findings and order requiring reciprocal switching adequately sustained by either the findings in the report or evidence in the record and was the Court in error in holding that the findings and evidence were sufficient, or instead were they arbitrary, unreasonable, and contrary to statutory standards in violation of the due process clause of the Fifth Amendment to the Constitution of the United States?

STATUTE INVOLVED

The sections of the Interstate Commerce Act pertinent here are section 1 (4) and (5) (49 U.S.C. 1 (4) and (5)) with respect to the duty of common carriers by railroad to establish reasonable through routes and to charge just and reasonable rates, section 3(5) setting forth findings necessary to authorize the Commission to force one carrier to permit use of its terminal facilities by another carrier, section 15(3) vesting the Commission with power to require the establishment of through routes and joint rates, section 15(4) providing for protection against short-hauling, and section 15(7) authorizing the Commission to suspend tariffs prior to the effective date thereof. Pertinent portions of these sections are set forth in Appendix D.

For convenience, the short-hauling restrictions in section 15(4) are here set forth as follows:

> "Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject

to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

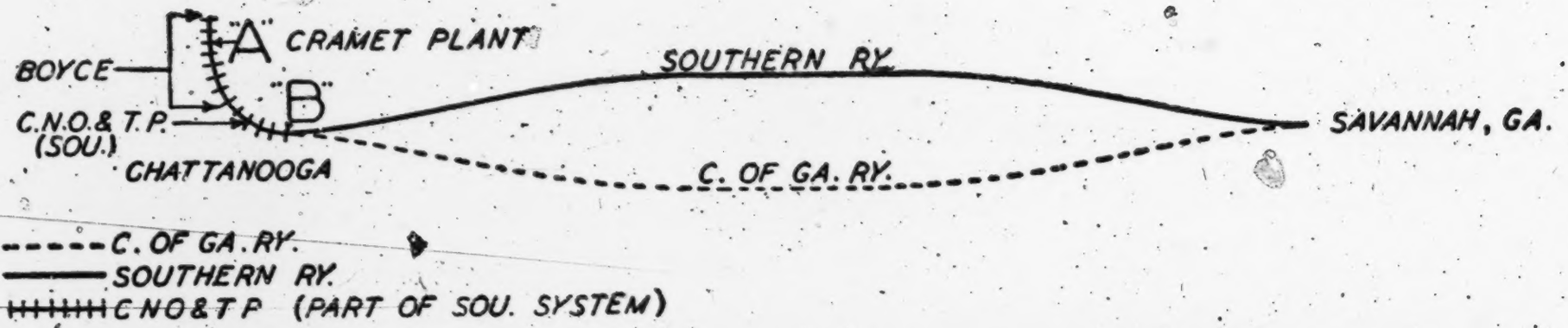
STATEMENT

The lower Court correctly said that in this case "we are concerned solely with reciprocal switching" (Appendix A, p. 3a). This issue, as the Commission's report shows, was raised by complaint filed by Cramet, Inc., on February 24, 1955, in No. 31737 with the Interstate Commerce Commission. This company has a plant located on what is known as the River track of the CNO&TP in Boyce, Tenn., beyond the city limits of Chattanooga, Tenn. The complaint alleged in substance that CNO&TP by tariff effective June 23, 1954, had discontinued reciprocal switching between connections with other railroads in Chattanooga and Cramet's plant on the CNO&TP line in Boyce; that such action was unjust and unreasonable in violation of section 1 and unduly prejudicial in violation of section 3 of the Interstate Commerce Act and requested the Commission to require defendants (appellants here) to provide for the switching of traffic at a switching charge between Boyce and the points of interchange with connecting lines at Chattanooga in respect to all carload traffic and to provide by absorption of the switching charge of CNO&TP for such service at rates the same as those to and from Chattanooga. (Appendix B, pages 440, 441)

The complaint also attacked the class rates then applicable on rutile ore from South Atlantic and Gulf ports to Boyce as violative of sections 1 and 3 of the Act. The Commission has prescribed reduced rates on this commodity the same to Boyce as to Chattanooga (Appendix C, p. 22a). This phase of the case, as previously noted, is not here involved.

In the proceeding before it, the Commission consolidated with Cramet's complaint in No. 31737 a complaint of the Central of Georgia Railway Company, which was supported by certain other carriers, and was directed primarily to proposed restriction by appellants of routing of rutile ore via Southern lines to Boyce. The Commission also included in the proceeding I. & S. docket No. 6284, in which rates on rutile ore proposed by appellants with certain routing restrictions had been suspended for investigation. In neither of the latter dockets (No. 31677 and I. & S. 6284) was there a request for reciprocal switching, the sole issue here.

Location of Boyce industries. The Cramet plant and plants of several other industries are located on the River track of the CNO&TP in Boyce extending from its main line beyond the city limits of Chattanooga and are indicated in the diagram shown on page 9. For convenience, the letter "A" represents the location of the Cramet plant and the letter "B" the point of interchange with another line-haul carrier, in Chattanooga, namely, the Central of Georgia. The point of interchange may be taken as illustrative of the situation as to the other railroads in Chattanooga, not counting Southern System lines. These other lines are the Nashville, Chattanooga & St. Louis Railway Company, and the Tennessee, Alabama & Georgia Railway Company.



Existing joint rate, C. of Ga. and CNO&TP, from Savannah to Boyce via C. of Ga., from Savannah to Chattanooga, thence CNO&TP to Cramet plant in Boyce. CNO&TP receives division of joint rate as *independent* connecting carrier.

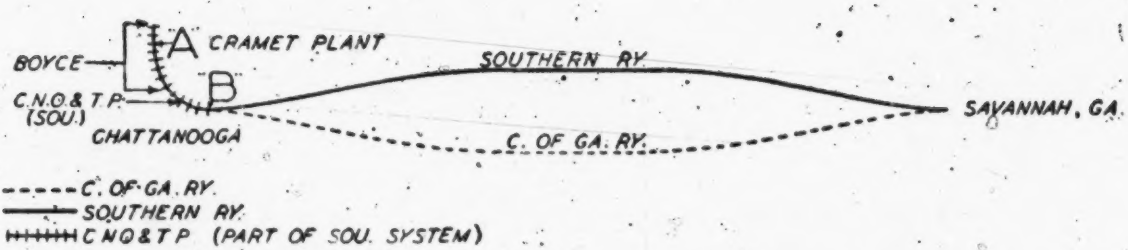
Reciprocal switching required by Commission:

C. of Ga. rate would apply to shipment from Savannah to Cramet plant in Boyce, being the same in amount as the joint rate.

CNO&TP would be required to switch from Chattanooga to Cramet as *agent* for C. of Ga., receiving only switching compensation.

CNO&TP would be compelled to relinquish haul in its own right from Chattanooga to Cramet, and act merely as involuntary *agent* for C. of Ga.

Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. At that time the plant of Cramet was in the early stages of construction. Its location is



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Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. At that time the plant of Cramet was in the early stages of construction. Its location is indicated by the letter "A". The situation then was, for example, that if a carload of traffic moved inbound to the Cramet plant on the River track from Savannah, Ga., it was hauled by the Central of Georgia to Chattanooga, where the car was turned over to the CNO&TP at "B" for further movement under a voluntary switching arrangement, to the Cramet plant at "A". The distance from "B" to "A" is approximately 3 miles, and to the end of the River track about 3½ miles (Exs. 8 and 20). CNO&TP acted as switching agent for the Central of Georgia in performing the service between "B" and "A" over its own line and made a switching charge against the Central of Georgia for the service, such charge being absorbed by the latter. The effect was that the rate of the Central of Georgia applied from Savannah to the Cramet plant in Boyce.

The CNO&TP was not a participating carrier in such rate and was not entitled to a division thereof but received merely payment of a lower switching charge from the latter. On outbound shipments, CNO&TP was not the bill of lading carrier and did not participate in the rate of the principal carrier, for example, Central of Georgia, which made out the bill of lading in its own name (R. 207).

Reciprocal switching to and from Boyce industries was cancelled by tariff, effective June 23, 1954. Under this tariff, CNO&TP no longer switched for the Central of Georgia (or other line-haul carrier) as agent but performed the haul from "B" to "A" as an independent carrier under existing joint through rates with such other carrier (R. 102, 106, Exs. 5 and 12).

Under the provisions of section 15(7) of the Act, the Commission is vested with power on its own motion or on protest, to suspend tariffs filed with it *prior* to their effective date. This tariff was protested prior to its effective date (R. 205, 239, 311) but was not suspended. It, therefore, became effective on that date. Its provisions are set forth as an appendix to the Commission's report (Appendix B, p. 449).

The tariff provides that "the CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph 2 of this item". Such exception is applicable only where the Chattanooga rates are different from the Boyce rates, a situation practically non-existent (R. 25, 109, 123, 210, 240, 351). The actual effect of the tariff, therefore, was to cancel reciprocal switching. This appears to be recognized by the Court, which said (Appendix A, p. 4a):

> "In reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the

action [of June 23, 1954] was that on competitive traffic destined to or from Boyce, CNO&TP refused to switch."

A similar conclusion was reached by the Commission.*

It is important to note that cancellation of reciprocal switching was an accomplished fact on June 23, 1954. This was approximately eight months prior to the complaint of Cramet in the present proceeding.

(a) The Court erroneously assumed that the tariff of June 23, 1954, cancelling reciprocal switching was under suspension.

A basic error, appellants believe, in the Court's consideration of the short-hauling question presented in this case under section 15(3) and (4) of the Act is in its failure to recognize that the CNO&TP tariff of June 23, 1954, as of that date, cancelled and put an end to reciprocal switching by CNO&TP as *agent* for other railroad lines between Chattanooga and Boyce. The tariff substituted, for such voluntary agency relationship, participation by the CNO&TP as an *independent* carrier in the existing joint rates with other carriers under which it received divisions for its haul between connections with such carriers in Chattanooga and the Boyce industries on the River track.

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* The Commission said (p. 445):

"It appears that the result thereof [the June 23, 1954 tariff] is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, * * * according to these provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga."

The following quotation from the Court's opinion indicates that it erroneously overlooked the finality of the June 23, 1954, tariff and assumed it to be under suspension, with the burden of proof cast upon appellants:

> "Secondly, historically, the record indicates that Boyce and Chattanooga were treated in all the tariffs identically until June 23, 1954. Thus it is to be borne in mind that the Commission is not now establishing a through route and joint rate under *Section 15(3), Title 49, U.S.C.* Upon the contrary, the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers parties thereto or authorization by the Commission. The action on the part of plaintiffs having been *suspended by the Commission* for investigation, the burden is upon plaintiffs to show its action is consistent with the public interest. This they have not done. It follows that plaintiffs are not giving up any rights or privileges exercised prior to June 23, 1954. It also follows that the conclusion of this Court is that plaintiffs are not short hauled by the order of May 4, 1956, contrary to *Section 15(4), Title 49, U.S.C.*" (Emphasis supplied).

The error of the Court, it is believed, is apparent for the following, among other, reasons:

(1) As previously indicated the tariff of June 23, 1954, cancelling reciprocal switching actually became effective on that date and the Commission declined to suspend. The Commission has no power under the Act "to suspend the operation of a schedule [tariff] after it has gone into effect." *Proposed Schedules of Rates on Lumber*, 21 I.C.C. 16, and *Wickwire Steel Co.* v. *New York Central & H. R. R. Co.*, 27 I.C.C. 168, 169. If it should be argued that the Court in referring to suspension may have had in mind the suspended

rutile ore rates, this appears at odds with the Court's own language. Moreover, it is to be noted that the Commission's order requiring reciprocal switching is not limited to rutile ore but covers *all carload traffic*; both *inbound* and *outbound*. The suspended rutile ore rates were rates in which the CNO&TP was a publishing or participating carrier. The rates prescribed by the Commission on this commodity are joint rates in which CNO&TP is a participating carrier, and there was no proposal that the previously existing joint rate arrangement under class rates, with CNO&TP a participant, should be replaced by rates to be published by other carriers with CNO&TP not a participant in such rates but merely a switching agent under reciprocal switching arrangements.

(2) The Court states that "the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers parties thereto or authorization by the Commission". This ignores the fact that the June 23, 1954, tariff did not require joint action with any other carrier to cancel reciprocal switching. It is well recognized that under reciprocal switching "the switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier". *Automobiles to Southern Ports for Export,* 225 I.C.C. 225, 229. The carrier performing the switching can alone cancel the reciprocal switching arrangement. *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I.C.C. 497, 498. Moreover, the reciprocal arrangement in the present case was a purely voluntary one.

(3) The Court overlooked that the CNO&TP having lawfully provided by its tariff of June 23, 1954, for cancellation of reciprocal switching and resulting participation under joint rates as an independent carrier

performing the haul between Chattanooga and Boyce, could not have this haul taken away by the order here involved requiring the CNO&TP to give up such haul. This would require CNO&TP to be short-hauled and to substitute, for its own haul, service by it as a mere switching agent for another carrier acting as principal and publishing the rates applicable to traffic to and from Boyce.

(4) Not being a suspension case as to reciprocal switching, there was no justification for assuming that the burden of proof was on appellants.

The Court, it is submitted thus misconstrued and erred in applying the provisions of section 15(3) and (4) and section 15(7) of the Act.

(b) The Court and the Commission misconstrued section 15(4) in assuming that the requirement of an agency relationship under reciprocal switching in lieu of service as a principal carrier does not involve short-hauling.

The Court adopts the Commission's view that short hauling is not here involved (Appendix A, p. 9a). This, it is believed, involves a misconstruction of section 15(3) and (4) and a misconception of the difference between the principal and agency relationships above pointed out.

It has long been recognized that under reciprocal switching the principal carrier, the line-haul carrier, publishes the rate, and the switching line does not join therein but performs the switching as the agent for the other line, receiving as compensation a separate switching charge published by it and paid by the other line. For example, in *Ezee Flow Corp.* v. *Illinois Central R. Co.*, 287 I.C.C. 281, involving alleged misrouting, the Commission pointed out (p. 284) that the

switching line, the Indiana Harbor Belt, "merely performed a switching movement within the Chicago switching district to its connection with the Illinois Central" and said:

> "The latter carrier [Illinois Central] performed the entire line-haul service from Chicago. The Illinois Central, therefore, was responsible as the initial carrier, the switching carrier having acted merely as its agent."

See also *Automobiles to Southern Ports for Export*, 225 I.C.C. 225, 229, supra, where it was held that "the switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier".

Such agency relationship is recognized in *Missouri Pac. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925). The switching carrier at destination was held to be merely an agent of the last line-haul carrier and, therefore, not liable for the loss incurred in the transportation. The Court said (p. 368-369):

> "The joint through rate covered delivery at the warehouse of the consignee. The bill of lading named Morgan's Louisiana & Texas Railroad & Steamship Company as the initial carrier and the route designated therein named the Missouri Pacific as the last of the connecting carriers. Its lines enter Fort Smith but do not extend to the consignee's warehouse. It employed the St. Louis-San Francisco to perform the necessary switching service. And it paid therefor $6.30, the charge fixed by the tariff on file with the Interstate Commerce Commission. The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri Pacific for the purpose of delivery. The Missouri Pacific was the delivering carrier and is liable as such."

In the present case, both the Court and the Commission, it is believed, misconstrued section 15(4) in failing to recognize the effect of the agency relationship, which would be brought about by the Commission's order. That order would require CNO&TP to act merely as *agent* for the principal carrier, for example, the Central of Georgia, or other carriers in performing service between Chattanooga and Boyce, and would compel CNO&TP to give up its own haul as an *independent carrier* in its own right under joint rates, thus losing its haul between Chattanooga and Boyce and its right to divisions under the joint rates instead of a lower switching charge. The deprivation of this haul would, in appellants' view, be nothing less than establishment of a new route in disregard of the short-hauling restrictions of section 15(4). Admittedly there has been no attempt to comply with those restrictions.

(c) The Court erroneously held that findings of the Commission and evidence in support thereof were sufficient to sustain the reciprocal switching order, although no unlawful discrimination was found and no legal injury shown.

In addition to the error above mentioned in misconstruing and misapplying the short-hauling provisions of section 15(3) and (4) of the Act and the suspension provisions of section 15(7), the Court, it is believed, erred in holding that the reciprocal switching order is sustained by proper findings and evidence in support thereof (Appendix A, pp. 6a, 7a).

The Commission's ultimate finding as to reciprocal switching, which is referred to by the Court, p. 5a, is:

> "In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a

> switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable." (p. 448)

Denial of reciprocal switching is thus found to be "unjust and unreasonable". There is no finding of unlawful discrimination or undue prejudice under section 3 or any other section of the Act.

The Commission found (p. 447), and the Court seemed to reach a similar conclusion (p. 6a), that—

> "This [proposed restriction of rutile ore to Southern's single-line route] would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga."

If this was intended by the Commission as a subsidiary or underlying finding in support of the reciprocal switching requirement, it completely fails of this purpose. The finding has reference to proposed rutile-ore rates restricted to apply over "single-line routes" of the Southern System. The railroad proposal was, for example, that rutile ore from Savannah to the Cramet plant at Boyce would be restricted to move only over the route of the Southern all the way from point of origin to the Cramet plant in Boyce. This proposal was suspended by the Commission. It concluded that such restriction should not be permitted and that other carriers should participate in routes to the Cramet plant. The Commission, therefore, in the part of its order not here attacked, prescribed lower rutile ore rates over routes which had previously existed. For example, a rate of $8.50 per ton was prescribed on this

commodity from Savannah to industries in Boyce, including the Cramet plant, such rate being applicable not only via the Southern System all the way but also over the route composed of the Central of Georgia from Savannah to Chattanooga and thence over the CNO& TP to the industries in Boyce. Before the suspension proceeding the CNO&TP participated in the joint rate from Savannah to the Cramet plant, receiving as an independent carrier a division thereof. Under the joint rates prescribed in this proceeding on rutile ore, CNO&TP will continue to act as an independent participating carrier and receive a division of the rate. Since the route will continue to be the same no question was raised by appellants in the present suit as to the establishment of a new route in respect to such joint rates on rutile ore or as to the application of the short-hauling provisions of section 15(4).

The reciprocal switching question presented in the present case is entirely different, and the above finding as to deprivation of "competitive service to and from Chattanooga" has no application. The reason is that the existence of joint rates not only on rutile ore but on all carload traffic to and from the Cramet plant or other Boyce industries, on the same level as the Southern System rates assures the free movement via either route to and from such industries, irrespective of reciprocal switching, which as previously indicated, was cancelled on June 23, 1954. It is also to be pointed out that unlike the joint rates on rutile ore which were prescribed over the same routes as those previously existing, with the CNO&TP a participant in each instance as an independent carrier, the part of the order here under attack requires CNO&TP to perform reciprocal switching, thus giving up its haul as an independent carrier on all carload traffic, including rutile ore, between Chattanooga and Boyce, and to assume

the involuntary role of a mere switching agent for the other carrier which itself would have the haul as principal. This, as noted above would result in short hauling CNO&TP without compliance with the restrictions in section 15(4) of the Act.

Moreover, the ultimate finding of unjustness and unreasonableness with respect to reciprocal switching, quoted above, apparently assumes a condition of higher rates via other lines after the cancellation of reciprocal switching on June 23, 1954, than if the traffic were handled by CNO&TP as a connecting carrier with such other carriers under joint rates. This overlooks the parity of the Chattanooga and Boyce rates.

Both the Court and the Commission, it is believed, erroneously failed to recognize their own findings, previously quoted, that the Boyce rates are the same as the Chattanooga rates. For example, the rate on a shipment from Savannah to Boyce over the single-line route of the Southern System was, and is, the same as the joint rate of the Central of Georgia and the CNO&TP, the haul of the Central of Georgia being from Savannah to Chattanooga and thence over the CNO&TP to the Cramet plant or other Boyce industries. This parity of rates is true as to all kinds of traffic and not merely as to rutile ore.

No injury to Cramet or other Boyce industries. In view of these undeniable facts as to parity of rates, there can be no rate injury. The reason is that Cramet and other Boyce industries will have the benefit of the same rates as industries within Chattanooga. Nor is there any showing or finding of service insufficiency or other injury. Cramet and other industries on the River track are local to the CNO&TP and the transportation between Chattanooga and those industries is performed by that carrier as an independent connect-

ing carrier under joint rates. The physical service would be the same between Chattanooga and the Boyce industries, and the shippers and receivers would pay the same total rate, whether the service would be under the existing joint rate arrangement or under reciprocal switching. There is no rate, service, or other injury as there was none in *Routing from or to Cantonment, Fla.*, 288 I.C.C. 708, 712.

The general rule is that reciprocal switching can be required against the will of the carrier involved only upon a showing of undue preference or prejudice under section 3 of the Act; that such showing must be not merely a difference in treatment but of injury to one shipper in relation to another and that the order must permit removal of the discrimination by affording the carrier the alternative of altering the treatment of either the one claimed to be prejudiced or the other claimed to be preferred or altering the treatment of both. See *Joseph A. Goddard Realty Co.* v. *New York C. & St. L. R. Co.*, 229 I.C.C. 497, 500, 501. No unlawful discrimination was there found nor a violation of section 1. As to the rule see also *Veenstra Lbr. & Supply Co.* v. *Chicago & N. W. Ry. Co.*, 279 I.C.C. 203, 208.

The Commission in its report in the present case cites *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I.C.C. 505, but in that case, unlike the present one, an undue prejudice finding was made.

Both the Court and the Commission seem to be of the opinion that Cramet was adversely treated in respect to the location of its plant on the River track at Boyce rather than elsewhere, believing that it would have reciprocal switching.

As to this it is to be noted that counsel for Cramet frankly and fairly stated at the hearing (R. 238) "that

there is no charge of bad faith or fraud or misrepresentation or of dishonesty or any of that sort of thing."

CNO&TP in its tariff of June 22, 1954, which became effective after the Cramet plant was located on the River track, took pains to continue the rate parity which had existed under reciprocal switching. (R. 310) As already noted the Boyce rates were the same as the Chattanooga rates, and the tariff provided as a protection of rate equality that, if the rare instance should arise where rates were different, this carrier would perform reciprocal switching, thus guaranteeing rate parity.

The Boyce industries were thus protected by the tariff in the same manner as industries in North Chattanooga as to which reciprocal switching had previously been discontinued and a like tariff had been published and applied since 1939 (R. 317). It was shown that there are some 36 of such industries in North Chattanooga and none has complained (R. 317).

In this connection it is also to be noted, as recognized by the lower Court, that the Boyce area was pioneered by Southern and it alone extended its line into this area. It believes that it is entitled under the Interstate Commerce Act to protection from invasion by other carriers, unless upon proper showing, not present here, such action is demonstrated to be justified.

No finding that compulsory use of CNO&TP is justified. Congress has provided in section 3(5) of the Act that involuntary use of the terminal facilities of one carrier by another may be required by the Commission but only upon the making of certain findings. In certain cases upon appropriate findings the Commission has required reciprocal switching under this section. *Hastings Commercial Club* v. *C., M. & St. P. Ry. Co.*, 69 I.C.C. 489; *Chicago & N. W. Ry. Co.* v. *Ann*

Arbor R. Co., 263 I.C.C. 287, 296; and *City of Milwaukee* v. *Chicago & N. Y. R. Co.*, 283 I.C.C. 311, 314. But no such findings have been made in the present case, and the Commission has not even purported to act under section 3(5). Nor have any of the parties sought to invoke the Commission's powers under this section.

The Commission is in substance seeking by its order to require the use of the CNO&TP terminal facilities in the Boyce area by other railroads, when Congress by section 3(5) has carefully shown its purpose not to permit such compulsory use, unless the Commission "finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier [CNO&TP] by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business". The Commission is further required to fix "compensation" for such use, to be "ascertained on the principle controlling compensation in condemnation proceedings" (See Appendix D, p. 24a).

The safeguards thus provided by statute against invasion of a carrier's terminal facilities by an order requiring involuntary use thereof should not be permitted, when as here there are completely absent any of the findings required by Congress.

The lower Court erroneously assumed that the Commission's order is sustained by ample findings. This was fatal error.

The Court in numerous cases has invalidated orders of the Commission because of the latter's failure to set forth findings which would afford the Court basis for concluding that the Commission had not exceeded its permissible judgment on the factors underlying the ultimate issues. See *State of Florida* v. *United States*, 282 U.S. 194; *United States* v. *Baltimore & O. R. Co.*,

293 U.S. 454; *Atchison, T. & S. F. Ry. Co.* v. *United States,* 295 U.S. 193; *United States* v. *Carolina Freight Carriers Corp.,* 315 U.S. 475; *City of Yonkers* v. *United States,* 320 U.S. 685; *Eastern-Central M. C. Ass'n* v. *United States,* 321 U.S. 194; *State of North Carolina* v. *United States,* 325 U.S. 507; and *State of Alabama* v. *United States,* 325 U.S. 535.

QUESTIONS ARE SUBSTANTIAL AND IMPORTANT.

As previously pointed out, appellants believe that the lower Court and the Commission have misconstrued and misapplied section 15(3) and (4) of the Interstate Commerce Act in holding that the short-hauling restrictions specifically provided for in section 15(4) could be ignored.

The right of railroads not to be short hauled, unless upon the showing provided for in section 15(4), which admittedly is not attempted here, is an extremely important one and has been recognized by Congress and this Court over a period of many years.

In striking down an order of the Commission running counter to the short-hauling provisions of section 15, this Court in *Thompson* v. *United States,* 343 U.S. 549, showed the importance of compliance with the restrictions in that section. Later in *Denver & Rio Grande West. R. Co.* v. *Union Pac. R. Co.,* 351 U.S. 321 (1956) the Court in referring to the *Thompson case,* again stressed the importance of such compliance, saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' *without faithful observance of restrictive conditions imposed by that section.*" (Emphasis supplied)

Preservation of carriers' rights under the short-hauling provisions of the Act and recognition of their rights in their own terminals make it highly important to the carriers here involved, to shippers, and to the public to have an authoritative interpretation of the statute and a determination of the limits of the Commission's authority, which it is believed, has here been exceeded.

The Commission in requiring the CNO&TP, one of appellants, to perform the reciprocal switching from the lines of other carriers at Chattanooga to and from industries in the Boyce area as a mere agent for such other carriers strips the CNO&TP of its haul as an independent carrier between these points under joint rates with the other carriers, and thus requires short hauling without compliance with the provisions of section 15(4) of the Act. The effect of this is to require CNO&TP to accept a low switching charge for the service it performs as an agent instead of higher line-haul divisions it would receive as a principal line-haul carrier.

The Commission thus by-passes the protective, short-hauling provisions of section 15(4) and ignores the requirements which must be met under section 3(5) to justify ordering involuntary use of CNO&TP terminal facilities by other carriers. In addition the suspension provisions of section 15(7) are misconstrued.

If, contrary to appellants' view, there should be any real need for reciprocal switching required by the Commission's order, such need can be tested under the provisions of section 15(4) which permits the Commission to require short hauling on a showing that the carrier's existing line is unduly long and the proposed line is necessary to provide adequate and more efficient service. But these provisions have been held by the

lower Court and the Commission to be inapplicable here. Moreover, the tests under section 3(5) are available but have been ignored.

Primarily a question of statutory construction is involved as to facts concerning which there should be little, if any, real dispute. Compare the *Dixie Carriers case,* 351 U.S. 56, supra, where an order of the Commission was set aside for failure to comply with the statute. But in addition to such misconstruction of the Act, it is believed that the Commission has exceeded its authority in requiring reciprocal switching without the necessary findings and evidence in support thereof.

Appellants, therefore, respectfully submit that the jurisdiction of this Court is shown, that the questions presented are substantial and highly important, that the case should be heard by the Court on briefs and oral argument, that the judgment of the lower Court should be reversed and that the portion of the Commission's order here under attack should be set aside.

Respectfully submitted,

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 26th day of October, 1957, I served copies of the foregoing statement on the several parties hereto, as follows:

(1) On the United States, by mailing a copy in a duly addressed envelope, with first-class mail postage prepaid, to—

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Victor R. Hansen, Esq.,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

James E. Kilday, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

Charles R. Esherick, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

and by mailing a copy in a duly addressed envelope, with airmail postage prepaid to—

Lester S. Parsons, Jr., Esq.,
United States Attorney,
For the Eastern District of Virginia,
Federal Building,
Richmond, Va.

(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Samuel R. Howell, Esq.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

(3) On intervening defendants by mailing copies duly addressed with air mail postage prepaid to their respective attorneys of record, as follows—

John W. Adams, Jr., Esq.,
104 St. Francis Street,
Mobile 8, Ala.

Charles P. Reynolds, Esq.,
147 Granby Street,
Norfolk 10, Va.

W. A. Miller, Esq.,
930 Broadway,
Nashville, Tenn.

Clifford T. Coomes, Esq.,
908 W. Broadway,
Louisville 1, Ky.

R. B. Claytor, Esq.,
c/o Norfolk & Western Ry. Co.,
Roanoke, Va.

R. B. Gwathmey, Esq.,
c/o Atlantic Coast Line R. R. Co.,
Wilmington, N. C.

Walter C. Scott, Jr., Esq.,
P. O. Box 642,
Savannah, Ga.

John S. Davenport, III, Esq.,
1300 Travelers Building,
Richmond, Va.

Robert N. Burchmore, Esq.,
Burchmore, Good, and Bobinette,
2106 Field Building,
Chicago, Ill.

and by mailing a copy in a duly addressed envelope with first-class mail postage prepaid to—

Martin A. Meyer, Jr., Esq.,
Investment Building,
Washington, D. C.

R. GRANVILLE CURRY

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

At Richmond

Civil Action No. 2432

SOUTHERN RAILWAY COMPANY, *et al, Plaintiffs*

v.

THE UNITED STATES OF AMERICA; *et al, Defendants*

(Argued February 20, 1957
Decided June 19, 1957)

Before SOBELOFF, Circuit Judge, and HUTCHESON and BRYAN, District Judges

Thomas B. Gay, Esquire
James T. Bistline, Esquire
Attorneys for Plaintiffs

Victor R. Hansen, Esquire, Assistant Attorney General, Lester S. Parsons, Jr., Esquire, United States Attorney, James E. Kilday, Esquire and Charles R. Esherick, Attorneys, Department of Justice
Attorneys for the defendant United States of America

Robert W. Ginnane, Esquire, General Counsel
Samuel R. Howell, Esquire, Associate General Counsel
Attorneys for the defendant Interstate Commerce Commission

John W. Adams, Jr., Esquire, Charles P. Reynolds, Esquire, W. A. Miller, Esquire, Clifford T. Coomes, Esquire, Martin A. Meyer, Jr., Esquire, R. B. Clayton, Esquire, R. B. Gwathmey, Esquire, Walter C. Scott, Jr., Esquire, John S. Davenport, III, Esquire
Attorneys for railroad intervenors, defendants and counter-claimants

Robert N. Burchmore, Esquire
Attorney for Cramet, Incorporated, Intervening Defendant

HUTCHESON, District Judge:

Southern Railway Company, hereinafter referred to as Southern, and The Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter referred to as C.N.O. & T. P., and collectively the two referred to as plaintiffs, bring this action under Sections 1336, 1398, 2284 and 2321-2325 of Title 28, U.S.C., and *Section 1009 of Title 5, U.S.C.*, to set aside and permanently enjoin the third ordering paragraph of the order of the Interstate Commerce Commission, entered in its docket No. 31737, *Cramet, Inc.* v. *Alabama Great Southern Railroad Co., et al, 298 I.C.C., 439*, dated May 4, 1956, as amended July 6, 1956, and affirmed October 1, 1956, requiring the C.N.O. & T.P. to restore Boyce, Tennessee, to the reciprocal switching limits of Chattanooga, Tennessee.

Cramet, Inc., and certain railroads which were also defendants in the proceedings before the Interstate Commerce Commission, were permitted to intervene under the provisions of *Section 2323 of Title 28, U.S.C.*, and *Rule 24(a) of Federal Rules of Civil Procedure* as defendants and to file their responsive pleadings.

The plaintiffs on November 16, 1956, were granted a temporary restraining order by this Court, restraining the Interstate Commerce Commission from enforcing the third ordering paragraph of the order of May 4, 1956, as affirmed by order of October 1, 1956.

Stripped of non-essentials, the issue before the Court is a narrow one and may be dealt with somewhat briefly.

Boyce, Tennessee, is what is known as an agency station in an unincorporated community, situated about 5.5 miles northeast of the Southern Railway freight station in Chattanooga, and outside the corporate limits of that city. The station house of C.N.O. & T.P. is actually within the corporate limits. The area generally is bounded by the main line of the C.N.O. & T.P. on the east, Chickamauga Creek on the north, the Tennessee River on the west and on the south by a line commencing at the river just south of

the Quaker Oats plant and running in an easterly direction to the main line of the C.N.O. & T.P. A portion of the area is in the city limits of Chattanooga. At the southeastern edge is located the modern electronic railroad yard of Southern known as Citico Yard. This yard and the main line of C.N.O. & T.P. lie between the industries served by C.N.O. & T.P. at Boyce and the main line of the N.C.&St.L.* from Atlanta to Chattanooga. The area is an industrial one and for more than fifty years has been served by the C.N.O. & T.P. by means of a track known as the River Track branching from the main line of the C.N.O. & T.P. and extending in a westerly direction to a point near the edge of the river. Anticipating the completion of certain dams across the Tennessee River, which would result in an increase in the value of real estate in this area for industrial purposes, Southern which controls C.N.O. & T.P. through stockholdings, acting through one of its subsidiaries, acquired a large tract of land within the area. C.N.O. & T.P. has spent considerable sums in the construction of additional trackage into the area. With the danger of damage from flood waters of the Tennessee River eliminated by the dam, the desirability of Boyce as sites for industrial plants has increased and additional industries have located there, including Cramet, Incorporated, a subsidiary of the Crane Company. Cramet, Incorporated, operates a Titanium plant which utilizes considerable quantities of rutile ore, a raw material used in the production of titanium metal, which is obtained in some quantities from this country and also from foreign countries. While there has been considerable discussion concerning the tariff on rutile ore, as will be seen freight tariffs are not involved here but we are concerned solely with reciprocal switching. Historically, the Boyce area has been within the switching limits of the City of Chattanooga, extending back as far as the beginning of the operation of the C.N.O. & T.P. into Chattanooga in 1881 and through routes and joint rates have been in effect for many

* The Nashville, Chattanooga & St. Louis Railway.

years, with daily exchange between the various carriers. In 1952 Cramet, after considering numerous other sites for the location of its large plant, (one site valued at $97,000.00, offered to it for only $1.00, which was declined) acquired a site within the Boyce area. One of the principal reasons for the selection of the Boyce site was that rail service was limited to a single spur, being one railroad at the other site, and that site was not within the Chattanooga switching district. During negotiations regarding locating this plant, representatives of Cramet were solicited by representatives of various organizations including Southern to establish a plant at Chattanooga, it being pointed out that such site was within the Chattanooga switching district. No intimation was made concerning the possibility of any change in that regard. As a result Cramet selected the site and commenced construction of a plant, representing an investment in excess of $25,000,000.00. On June 23, 1954, after construction had commenced, C.N.O. & T.P. cancelled the reciprocal switching arrangements then in effect, except in instances where the rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce. In reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the action was that on competitive traffic destined to or from Boyce, C.N.O. & T.P. refused to switch. The result of this action was to deny access into Boyce of shipments over competing lines except upon condition it receive a division of the line-haul rate, and to deprive the shippers in the Boyce area of the benefit of competitive rates and service.

Several proceedings before the Interstate Commerce Commission, referred to in the pleadings, which involve tariffs were had before the Interstate Commerce Commission.

In No. 31737 Cramet alleges that the action of the plaintiff here is unjust, unreasonable and unduly prejudicial; that the action of June 23, 1954, was designed to deny the industries in the Boyce area the switching rates from and to points of interchange at Chattanooga; deprived Cramet

of valuable services received from connecting railroads in violation of Sections 1 and 3 of the Act and in restraint of competition in contravention of the National Transportation Policy. The only question with which we are here concerned is the one presented by that portion of Docket No. 31737 in which the Commission found that "the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable".

In conformity with the foregoing findings, on May 4, 1956, the Commission issued its order containing what is referred to as the third ordering paragraph reading as follows:

> "*It is further ordered*, That said defendants (plaintiffs here), according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

Subsequently stay orders were granted. On November 16, 1956, Southern published rates to become effective December 20, 1956, the result of which is to exclude other carriers involved from participating in traffic to Boyce be-

cause of the restriction that the rates apply over its own lines only. The tenor and effect of the findings and order of the Commission bring into focus the issues here involved. The C.N.O. & T.P. by its action of June 23, 1954, in denying competing carriers reciprocal switching services from Chattanooga to Boyce and the publication by Southern of its tariff of November 16, 1956, result in depriving shippers at Boyce of the advantages of competitive services and competitive carriers are foreclosed from participating in transporting freight to Boyce unless there is a division of the line haul rate with Southern. A restoration of the reciprocal switching arrangement in effect for many years would relieve this situation. While applicable rates have been involved in this and related proceedings, the rates themselves are not here in controversy and no useful purpose would be served by a detailed discussion of that phase of the proceedings before the Commission.

From the pleading and exhaustive briefs of counsel, it appears that four general issues are presented for consideration: (1) what is the scope of review by the Court; (2) is the order of the Commission dated May 4, 1956, as amended by subsequent stay orders founded on sufficient findings, are the findings supported by sufficient evidence, and are the findings clear and unambiguous; (3) does Section 15(4) of the Interstate Commerce Act (49 U.S.C., 15(4)) have application in this case; (4) are the defendants entitled to relief on the counter-claim, and if so, what is their remedy.

The scope of review by a three-judge court is a well settled rule that can best be generalized to the effect that where the Commission's orders lie within the scope of the Commission's statutory authority and are based upon adequate findings, supported by substantial evidence, they should not be set aside, modified or disturbed by the court on review. Application of this rule to the instant case answers the second issue raised herein (supra). The Commission in affirming the amended order of May 4, 1956, thereby adopted said order. The facts were discussed in

detail, the contentions of all parties were set forth and the findings of the Commission were based thereon. The ordering paragraph complained of was founded upon the findings set forth. The result (i.e., findings) of the order was implicit in the order itself and can not be labeled unclear or ambiguous merely because of disagreement therewith. The courts have been uniform in holding that they should not go behind a final administrative order and that the test is sufficient findings, supported by substantial evidence. In this instance a review of the record discloses that the findings of the Commission are adequate and supported by ample evidence and it follows that the order of May 4, 1956, was in full compliance with the rule.

The contention of Southern to the effect that the Commission by the order of May 4, 1956, would short-haul Southern contrary to Section 15(4), 49 U.S.C.,** was answered fully by the Commission in its report at page 445.*** The

** Section 15(4) reads in part as follows:

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. * * *."

*** The report contains the following language:

"It is the position of the Cincinnati, New Orleans & Texas Pacific that it cannot be required to perform terminal services for other lines under a switching arrangement since it would thereby be short hauled in violation of section 15(4), citing City of Sheboygan, Wis., v. Chicago & N.W. Ry. Co., 227

distinction between the *City of Sheboygan, Wis., et al* v. *Chicago and North Western Railway Co., et al.* 227 I.C.C. 472, relied upon by Southern, and the present case is twofold. In the instant case sufficient public interest has been shown on the record to warrant the Commission's affirmative action and such public interest was held to be lacking in the *Sheboygan* case. Secondly, historically, the record indicates that Boyce and Chattanooga were treated in all the tariffs identically until June 23, 1954. Thus, it is to be borne in mind that the Commission is not now establishing a through route and joint rate under *Section 15(3), Title 49, U.S.C.* Upon the contrary, the action of plaintiffs, in effect, is the cancellation of an existing through route and joint rate without the consent of all carriers party thereto or authorization by the Commission. The action on the

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I.C.C. 472; Northwest Metal Products, Inc., v. C., M., St. P. & P.R. Co., 272 I.C.C. 401; and Whatcom County Traf. and Rates Bur. v. G.N. Ry. Co., 293 I.C.C. 119, among others. In those proceedings the Commission was asked to require the carriers which originated traffic to turn that traffic over to other carriers at points of origin, which would have created new routes over which the carriers on whose lines the traffic originated would have been short hauled. Here the issue is the lawfulness of a proposal by the Southern to exclude established routes from the application of reduced rates, which requires a showing that the proposal is consistent with the public interest. There is no warrant for the maintenance to Boyce or to Chattanooga of higher rates over some than over other routes, if the cancellation of routes as proposed is not shown to be consistent with the public interest. Where the Commission is not asked to establish through routes and the cancellation of routes is not shown to be consistent with the public interest, section 15(4) has no application. See United States v. Great Northern Ry. Co., 343 U.S. 562.

"The tariff provision designed to accomplish the removal of these industries at Boyce from the benefit of switching services from and to Chattanooga, except in stated situations, is quoted in the appendix hereto. It appears that the result thereof is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, according to those provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga."

part of plaintiffs having been suspended by the Commission for investigation, the burden is upon plaintiffs to show its action is consistent with the public interest. This they have not done. It follows that plaintiffs are not giving up any rights or privileges exercised prior to June 23, 1954.**** It also follows that the conclusion of this Court is that plaintiffs are not shorthauled by the order of May 4, 1956, contrary to *Section 15(4), Title 49, U.S.C.*

The relief sought by defendant in the counter-claim restated simply is, the prompt compliance by plaintiffs with the orders of the Interstate Commerce Commission. Therefore the Court having held that the plaintiffs are not entitled to relief from the order of the Commission of May 4, 1956, affirmed October 1, 1956, it follows that the temporary restraining order should be annulled and that plaintiffs be ordered to comply promptly with the orders of the Commission. Plaintiffs' petition for a permanent injunction will be denied.

**** See Atchison, T. & S.F. Rwy. Co. v. United States, 279 U.S., 768; and United States v. Great Northern Rwy. Co., 343 U.S. 562.

27460

INTERSTATE COMMERCE COMMISSION

INVESTIGATION AND SUSPENSION DOCKET NO. 6284[1]

RUTILE ORE FROM GULF AND SOUTH ATLANTIC PORTS TO TENNESSEE

Decided May 4, 1956

1. In I. and S. No. 6284, rates and routes proposed for rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce and Chattanooga, Tenn., found not shown to be just and reasonable. Proposed schedules ordered canceled, and proceeding discontinued.
2. In No. 31677, found that defendant's refusal to join in the establishment and maintenance of reduced rates on rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce, over routes presently maintained, is unjust and unreasonable.
3. In No. 31737, found (1) that rates maintained by defendants on rutile ore, in carloads, from South Atlantic and Gulf ports to Chattanooga and Boyce, were and are unjust and unreasonable; just and reasonable rates prescribed, and reparation awarded; and (2) that a tariff provision which would have the effect of removing Boyce from switching services at switching charges from and to Chattanooga, is unjust and unreasonable, and a lawful adjustment prescribed.

James A. Bistline, James L. Tapley, Walter C. Scott, Jr., William A. Miller, Clifford T. Coomes, Felix E. Autrey, and *U. B. Ellis* for respondents in I. and S. No. 6284.

Louis A. Schwartz, E. Del Wood, and *James U. Nichols* for protestants in I. and S. No. 6284.

Walter C. Scott, Jr., for complainant in No. 31677.

Felix E. Autrey, U. B. Ellis, and *William A. Miller* for interveners in No. 31677.

John S. Burchmore and *Robert N. Burchmore* for complainant in No. 31737.

George D. MacLean, E. Del Wood, and *James U. Nichols* for interveners in No. 31737.

James A. Bistline for defendants in Nos. 31677 and 31737.

REPORT OF THE COMMISSION

DIVISION 2, COMMISSIONERS FREAS, WINCHELL, AND MURPHY

BY DIVISION 2:

Exceptions to the report proposed by the examiner were filed by the Southern Railway Company system lines, which are respondents

[1] This report embraces also No. 31677, Central of Georgia Railway Company v. Cincinnati, New Orleans & Texas Pacific Railway Company, and No. 31737, Cramet, Inc. v. Alabama Great Southern Railroad Company et al.

and defendants. The complainants and certain other respondents and defendant rail carriers replied. Exceptions and requested findings not discussed in this report nor reflected in our finding or conclusions have been considered and found not justified.

By schedules indicated to become effective on November 9, 1954, the respondent rail carriers in southern territory proposed reduced commodity rates[2] on rutile ore, in carloads, from South Atlantic and Gulf ports to Chattanooga and Boyce, Tenn., for application over certain routes. Upon protest of various port authorities, shippers, and certain of the rail carriers, the proposed schedules were suspended to and including June 8, 1955, and they have been voluntarily postponed by the respondents until June 8, 1956.

In No. 31677, the Central of Georgia Railway Company, hereinafter called the Central, complains that the defendant The Cincinnati, New Orleans and Texas Pacific Railway Company, hereinafter called the Cincinnati, New Orleans & Texas Pacific, has published reduced commodity rates on rutile ore from named South Atlantic and Gulf ports to Boyce, in which certain other carriers would be allowed to participate but which would exclude the complainant and interveners, in violation of sections 1 (4) and 3 (4) of the Interstate Commerce Act. The Tennessee, Alabama & Georgia Railway Company, the Atlantic Coast Line Railroad Company, and The Nashville, Chattanooga and St. Louis Railway, hereinafter called the Nashville, Chattanooga & St. Louis, intervened in support of the complaint. The alleged violation of section 3 (4) of the act need not be considered in view of findings made as to other issues in these proceedings.

In the complaint in No. 31737, filed February 24, 1955, the complainant, Cramet, Inc., alleges that the rates maintained by the defendants on rutile ore, in carloads, from South Atlantic and Gulf ports to Boyce, where the complainant maintains a plant for the processing of rutile ore, were, are, and for the future will be unjust, unreasonable, and unduly prejudicial, in violation of sections 1 and 3 of the act, to the extent that they exceeded, exceed, or may exceed $7.50, for application from shipside. Reparation is sought. Shipments were made in September and November 1954. The complainant alleges also that the defendant Cincinnati, New Orleans & Texas Pacific, by the operation of a tariff provision in effect since June 23, 1954, designed to deny to industries at Boyce, switching service at switching rates from and to points of interchange at Chattanooga, deprives the complainant of many valuable services received from connecting railroads serving Chattanooga, in violation of sections 1 and 3 of the act, and in restraint of competition in contravention of the national transporta-

[2] Rates are herein stated per ton of 2,000 pounds except as otherwise indicated, and do not include the general increases authorized in Ex Parte Nos. 175 and 196.

tion policy. We are asked to prescribe reasonable rates and to require defendants to provide for the switching of traffic at a switching charge between Boyce and the points of interchange with connecting lines at Chattanooga, that will, by reason of the absorption of the charge, result in rates the same as those to and from Chattanooga. The Central Soya Company, Inc., the Chattanooga Chamber of Commerce, and the Chattanooga Manufacturers Association intervened in support of the complaint.

The proposed reduced rates to both Chattanooga and Boyce, which would apply from shipside, subject to a minimum of 80,000 pounds, are $7.40 from Savannah, Ga., $9.50 from Newport News and Norfolk, Va., and $8.50 from the various other South Atlantic and Gulf ports. The Central also proposed a proportional rate from Savannah to Chickamauga, Ga., of $3.90, to apply on shipments destined beyond Chickamauga. This rate added to the applicable class rate from Chickamauga to Boyce, would result in a rate of $7.50 from Savannah to Boyce. This method of publication was deemed necessary because of the refusal of the Southern[3] to permit the Central to participate in the proposed single-factor rate from Savannah to Boyce.

Rutile ore is a source of titanium, and is obtained in Australia as well as from certain sources in this country. Cramet, Inc., is a wholly owned subsidiary of the Crane Company and was organized to engage in the production of titanium from rutile ore. Except for two shipments which are not here concerned, Cramet's shipments of record from Australia moved through the ports of Savannah and Charleston, S. C., to Boyce at class rates of 52 and 55 cents per 100 pounds, or $10.40 and $11 per ton, respectively. In addition to the line-haul class rate, there are also certain terminal charges for movement from shipside which amount generally to $1.10 per ton. The rutile ore, which resembles a sandy clay, could be shipped loose, although Cramet's shipments have been in bags. It has a value of about $100 per ton, and is not susceptible to damage from the weather.

The choice of Boyce as a site for Cramet's plant, which, when completed, will cost in excess of $25 million, was influenced largely by the fact that, in addition to being suitable from a physical standpoint, Cramet was informed that the plant would be within the switching limits of Chattanooga. Prior to the selection of the site chosen, two other sites in Chattanooga had been considered and rejected. One of these sites was offered to this complainant at the price of $1, but, despite the fact that it was valued at almost $100,000, the site was rejected because it was not within the switching limits of Chattanooga. Another

[3] The term Southern as used herein refers to the various component lines comprising the Southern Railway system, which as far as herein pertinent include The Alabama Great Southern Railroad Company, the Cincinnati, New Orleans & Texas Pacific, and the Southern Railway Company.

te, at Nashville, Tenn., had been considered, and when the site finally
osen was first considered the Nashville site had been practically
reed upon, and a statute was enacted by the Tennessee Legislature to
rmit the sale of the site, which was State-owned, to the complainant.
uring the negotiations for the site chosen at Boyce, it was pointed
t to the complainant that it would have the advantage of being
thin the Chattanooga switching limits; and that is alleged to have
en one of the prime considerations leading to the choice of the site.
A representative of the Southern was present at most of the negotia-
ons and gave no indication of a probability of exclusion of industries
Boyce from the Chattanooga switching limits. Also, a representa-
ve of the Southern informed the complainant that the chosen site was
termediate to two industries then in the switching limits and that the
rrier's terminal tariff provided that an industry at such an interme-
iate site would automatically be included in the switching limits.
evertheless, a few months after the site was chosen and before the
ant was completed, the Cincinnati, New Orleans & Texas Pacific
tablished certain provisions in its terminal tariff which had the prac-
cal effect of removing Boyce from the Chattanooga switching limits,
least insofar as the traffic here in issue is concerned.

There have been negotiations concerning rates between Cramet and
e rail carriers serving certain of the ports and Chattanooga and
oyce since shortly after the plant was located at the latter point.
he principal rail parties engaging in these negotiations have been
e Central and the Southern. Savannah is the port nearest to the
estination, and it is considered the key port in the establishment of
ates on this traffic. The Southern first proposed import rates there-
om equal to the present class rates, which do not apply from ship-
de, thus reducing the through charges from shipside by about $1.10
er ton, and the Central proposed a rate of $8.50 from shipside. The
outhern indicated an intention to establish a through rate restricted
o its own single-line operation between Savannah and Boyce, and the
entral announced that it would establish a proportional rate to Chick-
mauga, which, in connection with the class rate beyond, would pro-
ide a through rate the same as that proposed by the Southern. The
tter then announced that it would undercut any rate established by
e Central by 10 cents a ton. The result was the publication of the
ates now under suspension. The Southern protested its own rate of
7.40, as well as the proportional rate of $3.90 to Chickamauga estab-
shed by the Central.

The presently applicable class 25 rates on rutile ore, minimum 60,000
ounds, converted to amounts per net ton, from various ports to Chatta-
ooga and Boyce are as follows:

From—	Rates	From—	Rates
Norfolk, Va.	$13.20	Panama City, Fla.	$11.00
Charleston, S. C.	11.00	Pensacola, Fla.	10.40
Savannah, Ga.	10.40	Mobile, Ala.	10.60
Brunswick, Ga.	10.60	Gulfport, Miss.	11.00
Jacksonville, Fla.	11.40	New Orleans, La.	11.60

As stated, certain terminal charges for handling from shipside at the ports increase the through charges by about $1.10 per ton when the movement is at class rates.

None of the respondents other than the Southern contends that the class 25 rates are reasonable for this traffic. The Southern takes the position that the class rates are not in excess of reasonable maxima, but is agreeable to the establishment of a rate of $8.50, minimum 80,000 pounds, from all the ports other than the Hampton Roads ports, and a rate $1 higher from the latter ports. The Central contends that $7.50, minimum 80,000 pounds, is a maximum reasonable rate from shipside at Savannah, which is the only port served by the Central. Cramet takes the position that a rate in excess of $7.50 is unreasonable and asks reparation on past shipments to that basis.

In support of the proposed rate of $7.50 from Savannah, the Central shows that, when increased by the surcharge of 15 percent authorized in Ex Parte No. 175 and diminished by the current terminal charges at the port, this rate for the average weight of the shipments of record, about 51 tons, would yield $383.78 per car and 85.35 cents a car-mile over the short tariff route of 449 miles. A rate of $7.50, less the terminal charges, would yield, for the average distance from Savannah to Boyce, 13.3 mills a ton-mile, and, on a minimum loading of 40 tons, about 53 cents a car-mile. The average distance from all the ports to Boyce is about 620 miles. Based on this distance and the minimum, a rate of $7.50 less the port terminal charges would yield but slightly more than 10 mills a ton-mile and 41 cents a car-mile, while a rate of $8.50 would yield about 12 mills a ton-mile and 47.7 cents a car-mile. A rate of $8.50 plus the surcharge of 15 percent, less terminal costs of $1.10, would yield, for the average distance from all the ports to Boyce, about 14 mills a ton-mile and a minimum of 56 cents a car-mile. Based on the average loading and actual distances of 451 and 536 miles over routes used from Savannah and Charleston, the present rates yield from $1.05 to $1.18 a car-mile and from 20.5 to 23.1 mills a ton-mile.

In support of its contention that a rate of $7.50 would be reasonable on this traffic, Cramet shows that this rate, less the terminal charges, would approximate 15.5 percent of the first-class rate from Savannah to Boyce, and that certain rail carriers now maintain rates approximating 15.9 percent of first class on rutile ore from points in Florida to points in New York. This complainant also shows that certain rates

on comparable ores, such as ilmenite and zircon, are maintained between numerous points on bases ranging from 12.1 to 17 percent of first class. These rates are maintained for distances substantially greater than those from the ports to Boyce. The Southern contends, on exceptions, that the rates with which comparisons are made are depressed rates, established for various reasons such as water competition, at less than maximum reasonable levels. A rate of $8.50 would range from 17.7 to 20.4 percent of first class from the various ports south of Norfolk. The Southern instances prescribed rates on numerous commodities, not shown to be comparable with rutile ore, ranging from 25 to 35 percent of first class.

As to the question whether the attempt to curtail the routing presently available on this traffic is violative of any provision of the act, the Southern contends that it has the right to do so under the so-called short-hauling provisions of section 15 (4) of the act. It contends further that the Central has no right to establish a proportional commodity rate to an intermediate point which, in combination with the class-rate factor beyond the basing point, would result in a through rate for the transportation of this traffic over a route composed in part of the Central that would short haul the Southern. Under the provisions of section 15 (3) of the act, the cancellation, without the consent of all parties thereto, of any through route must be shown to be "consistent with the public interest" without regard to the short-hauling provisions of paragraph (4) of this section. In the establishment of routes by the Commission, the carrier that originates the traffic is entitled to reasonable preference, but this also must be "consistent with the public interest," and establishment of routes that short haul carriers may be required if such routes are needed to provide adequate and more efficient transportation.

The number of routes proposed from the various ports to Chattanooga and Boyce, in comparison with those available in connection with the present rates, are shown below.

From—	Number of routes published in connection with suspended rates on rutile ore from ports shown below to—		Normal number of tariff routes to—
	Boyce, Tenn.	Chattanooga, Tenn.	Chattanooga, Tenn.
Savannah, Ga.	1	1	36
Panama City, Fla.	4	10	11
New Orleans, La.	1	8	90
Gulfport, Miss.	4	10	43
Mobile, Ala.	2	8	58
Pensacola, Fla.	5	9	16
Jacksonville, Fla.	2	21	23
Brunswick, Ga.	1	10	19
Charleston, S. C.	1	19	40
Norfolk, Va.	11	19	21
Newport News, Va.	4	14	5

Of 89 shipments of record which moved prior to the hearing, 59 originated on the Central at Savannah, 14 on the Southern at that port, and 16 moved over the Southern from the port of Charleston. The Southern operates from and to the docks at Savannah only over the tracks of the Central, over which the Southern enjoys trackage rights. What the Southern is proposing for application from Savannah includes the use of the tracks and dock facilities of the Central at Savannah in the effort to eliminate the latter as a competing carrier. The established through routes between the ports and Boyce have been in use more than 50 years. They would continue to be open for the movement of traffic at the presently applicable joint class rates if the proposed rates were to become effective.

It is the position of the Cincinnati, New Orleans & Texas Pacific that it cannot be required to perform terminal services for other lines under a switching arrangement since it would thereby be short hauled in violation of section 15(4), citing *City of Sheboygan, Wis.*, v. *Chicago & N. W. Ry. Co.*, 227 I. C. C. 472; *Northwest Metal Products, Inc.*, v. *C., M., St. P. & P. R. Co.*, 272 I. C. C. 401; and *Whatcom County Traf. and Rates Bur.* v. *G. N. Ry. Co*, 293 I. C. C. 119, among others. In those proceedings the Commission was asked to require the carriers which originated traffic to turn that traffic over to other carriers at points of origin, which would have created new routes over which the carriers on whose lines the traffic originated would have been short hauled. Here the issue is the lawfulness of a proposal by the Southern to exclude established routes from the application of reduced rates, which requires a showing that the proposal is consistent with the public interest. There is no warrant for the maintenance to Boyce or to Chattanooga of higher rates over some than over other routes, if the cancellation of routes as proposed is not shown to be consistent with the public interest. Where the Commission is not asked to establish through routes and the cancellation of routes is not shown to be consistent with the public interest, section 15(4) has no application. See *United States* v. *Great Northern Ry. Co.*, 343 U. S. 562.

The tariff provision designed to accomplish the removal of these industries at Boyce from the benefit of switching services from and to Chattanooga, except in stated situations, is quoted in the appendix hereto. It appears that the result thereof is the division of charges from joint rates applicable to and from Boyce other than by the absorption of a switching charge. The only condition under which the traffic will be switched at a switching charge, according to these provisions, is an absence of the same rates to or from both Boyce and Chattanooga. The evidence indicates that few, if any, rates to Boyce are not the same as those on like traffic to Chattanooga.

Boyce is an unincorporated community served by the Cincinnati, New Orleans & Texas Pacific and the Nashville, Chattanooga & St. Louis, and is shown in tariffs as a separate station. It is within the limits of the area served by the Citico yard of the Southern, embracing also Chattanooga and other surrounding industrial areas. The Boyce station house of the Cincinnati, New Orleans & Texas Pacific is actually within the corporate limits of Chattanooga, but the siding serving Cramet, Central Soya, and 3 or 4 other industries which diverges from the Cincinnati, New Orleans & Texas Pacific main line within the Chattanooga corporate limits at Boyce, leaves the corporate limits before reaching those industries. The Nashville, Chattanooga & St. Louis approaches Chattanoga from the South by means of a line extending around the city and passing through Boyce before reaching Chattanooga. The rails of the latter carrier parallel those of the Cincinnati, New Orleans & Texas Pacific, and others of the Southern's constituent lines, from a point somewhat north of Boyce to and through Chattanooga. The Southern Railway approaching Chattanooga from the South also swings around the city and joins the rails of the Cincinnati, New Orleans & Texas Pacific at a point north of Boyce. The movement of carload traffic from the terminals of connecting lines and the classification yard to industries at Boyce is by switching crews.

The rails of the Central enter Chattanooga from the South as do those of the Tennessee, Alabama & Georgia Railway Company, and these two carriers, as well as the Nashville, Chattanooga & St. Louis, interchange with the Southern at the same point in the classification yard of the latter which extends from the metropolitan area of Chattanooga to and beyond Boyce. The interchange point of the Southern with other main-line carriers is about 2.6 miles from the point at which the track serving Cramet, Central Soya, and other industries leaves the Cincinnati, New Orleans & Texas Pacific main line. It is thus seen, that while Boyce is listed as a separate station and is so treated in the tariffs of the Southern, it is partly within the Chattanooga corporate limits and is served by the classification and switching yards which serve Chattanooga.

The community of North Chattanooga is also partly within the corporate limits of Chattanooga. This community is reached by rail over a track diverging from the main line of the Cincinnati, New Orleans & Texas Pacific at some distance north of the point at which the Southern and the Nashville, Chattanooga & St. Louis approach those tracks from the east. This track of the Cincinnati, New Orleans & Texas Pacific serving North Chattanooga connects with the rails of the Chattanooga Traction Company, serving a portion of North Chattanooga, at C. & D. Junction lying north of the Tennessee River.

North Chattanooga is governed by a tariff provision similar to that shown in the appendix hereto. While it contains a statement that industries at North Chattanooga are included in the Chattanooga switching limits, it provides that the Cincinnati, New Orleans & Texas Pacific will perform switching to or from North Chattanooga only when the rates are different from those to or from Chattanooga. There has been no attempt to curtail routing to North Chattanooga as is proposed for the movement of rutile ore to Boyce.

The Jackson Manufacturing Company, located in the vicinity of Boyce, just across the main-line rails from the station house at that point, is served by the Belt Railway, a subsidiary of The Alabama Great Southern Railroad Company, one of the Southern's constituent lines. This industry is treated as within the switching limits and is accorded the benefit of reciprocal switching requiring a longer switching movement than is required for industries lying across the main-line tracks of the Cincinnati, New Orleans & Texas Pacific. Another industry, the Quaker Oats Company, is served by a switch track connecting with Southern in the classification yard at or near the point at which interchange is made with connecting lines. This switch track, like that serving Cramet and Central Soya, extends from the Southern's main line at a point within the corporate limits, but the industry itself is outside of the corporate limits. The industry is treated as within the Chattanooga switching limits and has the benefit of reciprocal switching. This firm is in competition with Central Soya, as are two or three other firms handling similar products that are within the Chattanooga switching limits.

Cramet insists that the disadvantages of location upon the rails of a single railroad are so great, due to difficulties encountered in securing satisfactory service, in obtaining empty cars, and in numerous other ways, that service to and from Chattanooga over more than one line was considered when it located its plant at Boyce. In support of this contention, it points to the fact that it had virtually decided to purchase a site at Nashville at a substantial price and make an initial expenditure of $100,000 for grading rather than accept a site at Chattanooga served by a single railroad, at a price of $1.

The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I. C. C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant

in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential.

In Investigation and Suspension Docket No. 6284, we find that it is not shown that the proposed cancellation of routes, in connection with the establishment of the proposed reduced rates, is consistent with the public interest, and that the proposed schedules therefore are not shown to be just and reasonable.

In No. 31677, we find that the defendant's refusal to join in the establishment and maintenance of reduced rates over routes presently maintained from South Atlantic and Gulf ports to Boyce, the same as proposed for application when the defendant receives a line haul into Chattanooga, is unjust and unreasonable.

In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

We further find in No. 31737, that the rates presently in effect on rutile ore, in carloads, from the various South Atlantic and Gulf ports embraced herein to Chattanooga and Boyce were, are, and for the future will be unjust and unreasonable to the extent that they exceeded, exceed, or may exceed rates; subject to a minimum of 80,000 pounds, from shipside, of $8.50 from the various ports embraced herein other than Newport News and Norfolk, and of $9.50 from the latter two ports, plus applicable increases as authorized in Ex Parte Nos. 175 and 196.

We further find that the complainant in No. 31737 made shipments as described; and paid and bore the charges thereon at rates herein found unreasonable, was damaged thereby to the extent of a difference between the charges paid and those which would have accrued at the rates herein found reasonable, and is entitled to reparation, with interest. The complainant should comply with rule 100 of the General Rules of Practice.

Orders requiring cancellation of the schedules proposed in I. and S. No. 6284, and the establishment of an adjustment as prescribed in No. 31737, will be entered. In view of the requirements of the order entered pursuant to the findings in No. 31737, the entry of an order in No. 31677 is unnecessary. The establishment of rates as thus required will avoid and remove any undue prejudice and preference as alleged in No. 31737.

APPENDIX

ITEM 15. APPLICATION OF RATES TO AND FROM INDUSTRIES AND LOCATIONS AT B
TENN.

(1) The CNO & TP Ry. Co. will not switch carload traffic between Chattan
Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2) (*a*) Industries and locations on the CNO & TP Ry. Co. at Boyce, T
are included in the Chattanooga, Tenn., switching limits, and the CNO & TI
Co. will switch carload traffic between said industries and locations and
of interchange with connecting lines at Chattanooga, Tenn., only to the e
provided in subpar graphs (*b*) and (*c*) of this item.

(*b*) Where there is an applicable commodity rate or mileage scale ra
effect to or from (as the case may be) Chattanooga, Tenn., and the same
modity rate or mileage scale rate is not in effect via any line or route to or
(as the case may be) Boyce, Tenn., or

(*c*) When there is an applicable class rate in effect to or from (as the
may be) Chattanooga, Tenn., and the same class rate is not in effect via any
or route to or from (as the case may be) Boyce, Tenn.

APPENDIX C

Order

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 2, held at its office in Washington, D. C., on the 4th day of May, A. D. 1956.

Investigation and Suspension Docket No. 6284
Rutile Ore—Gulf and South Atlantic Ports to Tennessee

It appearing, That by order dated November 8, 1954, the Commission entered upon a hearing concerning the lawfulness of the rates, charges, regulations, and practices stated in the schedules enumerated and described in said order, and suspended the operation of said schedules to and including June 8, 1955, and that the respondents have voluntarily postponed the effective date of the schedules until June 8, 1956;

It further appearing, That a full investigation of the matters and things involved has been made, and that said division, on the date hereof, has made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the respondents herein be, and they are hereby, notified and required to cancel said schedules, on or before June 11, 1956, upon not less than one day's notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and that this proceeding be, and it is hereby, discontinued.

No. 31737

CRAMET, INC.

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted

by the parties, full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 10, 1956, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of carload traffic from and to the points designated in the succeeding paragraphs hereof rates which exceed, and practices which differ from, those prescribed in said paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation, in carloads, of rutile ore, minimun 80,000 pounds, rates which shall not exceed $8.50 per ton of 2,000 pounds from the Atlantic and Gulf ports embraced herein south of Norfolk Va., to Chattanooga and Boyce, Tenn., and $9.50 per ton of 2,000 pounds from Newport News and Norfolk, Va., to the said destinations, plus increases authorized in Ex Parte Nos. 175 and 196.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn.,

to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga.

And it is further ordered, That this order in No. 31737 shall continue in full force and effect until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary

(SEAL)

APPENDIX D

Pertinent Provisions of the Interstate Commerce Act

Sec. 1 (4). It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; and it shall be the duty of common carriers by railroad subject to this part to establish reasonable through routes with common carriers by water subject to part III, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers.

Sec. 1 (5). All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and

reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

Sec. 3 (5). If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

Sec. 15 (3). The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject

to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. The Commission shall not, however, establish any through route, classification or practice, or any rate, fare, or charge, between street electric passenger railways not engaged in the general business of transporting freight in addition to their passenger and express business, and railroads of a different character. If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section.

Sec. 15 (4). In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however*, That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would par-

ticipate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

Sec. 15 (7). Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants,*

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, *et al., Appellees.*

REPLY OF APPELLANTS TO MOTION OF RAILROAD APPELLEES AND MOTION OF APPELLEE CRAMET, INC., TO AFFIRM.

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

December 23, 1957.

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REPLY OF APPELLANTS TO MOTION OF RAILROAD APPELLEES AND MOTION OF APPELLEE, CRAMET, INC., TO AFFIRM.

Appellees filing motion. This reply is to the motion of railroad appellees and appellee, Cramet, Inc., to affirm the judgment of the District Court.

No motion by the Government. It is believed significant that while the United States of America and Interstate Commerce Commission are appellees, neither has filed a motion to affirm. It seems reasonable to infer from this that they do not agree with the other appellees and that they view appellants' Jurisdictional Statement as sufficient to demonstrate that the questions

raised are important and justify further consideration by this Court.

THE BASIC FACTS

The suit here involved is one to set aside that portion of an order of the Interstate Commerce Commission (298 I.C.C. 439), (a) requiring the appellee, CNO&TP, to perform switching between Chattanooga, and Boyce, Tenn., as an agent for the railroad appellees, the line-haul carriers, thus forcing the CNO&TP to give up its independent status as a line-haul, connecting carrier, in contravention of the short-hauling provisions of section 15(4) of the Interstate Commerce Act (49 U.S.C., sec. 15(4)), (b) making such requirement and thus invading the CNO&TP's terminal without compliance with section 3(5), and (c) forcing appellants to relinquish their common law and statutory rights without necessary findings and evidence to support such action.

The railroad appellees appear to stray from the basic facts having significance with respect to the question here involved, and resort to a discussion of the part of the Commission's order and the facts relating thereto which are not here in issue (pp. 3, 6-10). Appellants are not attacking the Commission's order prescribing line-haul rates on rutile ore. The appellees prevailed as to such rates, and appellants' attack does not relate to that part of the order.

The basic question here, as the lower Court stated, is with respect to "reciprocal switching".* The significant facts are as follows:

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* The lower Court said that in this case "we are concerned solely with reciprocal switching" (Appendix A, p. 3a to Jurisdictional Statement).

(1) The plant of the appellee, Cramet, and the plants of several other industries, are located on the River track of the CNO&TP (part of the Southern Railway System) in Boyce, Tenn., a short distance beyond the city limits of Chattanooga, Tenn.

(2) The CNO&TP connects at Chattanooga with the lines of appellees, C. of G., the NC&StL (now part of the L&N), and the TA&G*, in addition to other lines of the Southern Railway system.

(3) At the time of the proceeding before the Commission, joint line-haul rates applied to Cramet and other industries in Boyce, with the CNO&TP, a participating carrier in such joint rates and receiving a division thereof for its haul between its connection with the line-haul carrier at Chattanooga, for example, the Central of Georgia, and the Cramet plant, or other industry, on the River track in Boyce (See sketch, Juris. Stat., p. 9).

(4) The joint rates thus in effect to Boyce, or from Boyce, and with CNO&TP, a participant therein as a connecting carrier in its own right, were, and are, for all practical purposes the same as the rates to and from Chattanooga. Thus Cramet and other industries on the River track in Boyce have the same rates as industries in Chattanooga.**

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* These railroads are the Central of Georgia Railway Company, the Nashville, Chattanooga & St. Louis Railway Company, the Louisville & Nashville Railroad Company and the Tennessee, Alabama & Georgia Railway Company.

** In the Cramet motion it is said (p. 10): "It is conceded on both sides that the existing line-haul rates provided in the tariffs of all carriers are generally the same to and from Boyce as to and from Chattanooga."

(5) Prior to June 23, 1954, the industries on the River track in Boyce were in the Chattanooga reciprocal switching district. Under such reciprocal switching arrangement CNO&TP acted as switching agent for the line-haul carrier, for example, the Central of Georgia, in performing the service between its connection with that carrier and the industry on the River track. For such service it collected a switching charge from the line-haul carrier, the charge being absorbed by that carrier. The effect was that the rate of the line-haul carrier applied from point of origin to the Cramet plant, or other plant, in Boyce on the River track.

The CNO&TP was not a participating carrier in the line-haul rate under such reciprocal switching arrangement and was not entitled to a division thereof. On outbound shipments the CNO&TP was not the bill-of-lading carrier and did not participate in the rate of the principal carrier, which made out the bill-of-lading in its own name.

(6) By tariff, effective June 23, 1954, eight months before Cramet filed its complaint with the Commission, the reciprocal switching arrangement as to traffic to and from the Boyce industries was cancelled as of that date. Although the tariff was protested prior to its effective date it was not suspended. The actual effect of the tariff was to cancel reciprocal switching. It ended CNO&TP's service as an agent of the line-haul carrier, and enabled it to participate, as it then did, as a connecting carrier in its own right under joint rates with the line-haul carriers and to receive a division of the joint rate for its service between the plant of the industry at Boyce and the connection of the line-

haul carrier in Chattanooga, such division being substantially greater than the switching charge.

The tariff which cancelled the reciprocal switching arrangement on June 23, 1954, expressly provided:

> "The CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn."

Thus there was put to an end not only the making of a switching *charge* but the rendering of a switching *service* as agent for the line-haul carrier. The tariff provided, as an exception, that if the Boyce line-haul rates should be different from the Chattanooga line-haul rates reciprocal switching would be performed by the CNO&TP thus making applicable the lower Chattanooga line-haul rate. This was provided in order to protect the industries against ever paying more for the transportation to or from Boyce than to or from Chattanooga. Such rate differences were in substance non-existent, and the exception; therefore, has not been used though available. Both the Commission and the Court were in agreement that for practical purposes the switching arrangement had been cancelled.

(7) In like manner the Southern had cancelled reciprocal switching as to industries in North Chattanooga, an area, like Boyce, in the outskirts of the City of Chattanooga. This was done as long ago as 1939. The tariff provisions were practically the same as those in the present case. The North Chattanooga industries are served under joint line-haul rates, with the Southern a connecting carrier in performing the transportation service to and from the plant, just as the CNO&TP performs the service as a line-haul carrier between Chattanooga and Boyce.

The appellees filing motions here have failed to mention the North Chattanooga situation. There are some 36 industries in that area, and none has complained. They, like the industries here, are fully protected by having the same rates as the Chattanooga rates.

The Commission's requirement. As shown in the Jurisdictional Statement, the Commission by the order here under attack ordered restoration of reciprocal switching by CNO&TP as to the Boyce industries. It thus forced this carrier to give up its right to handle traffic between Chattanooga and the Boyce industries as a connecting common carrier, entitled to a division of the joint rates applicable to the entire transportation service. CNO&TP was thus compelled to change its status from an independent connecting carrier entitled to the haul between Chattanooga and Boyce in its own right to a mere agent for the line-haul carrier, with a switching charge less than its division as a connecting carrier.

Such action, it is believed, is based upon an utter misconstruction of the short-hauling provisions of the Act, is in disregard of the controlling facts, and is invalid.

ARGUMENT

I. APPELLEES ERRONEOUSLY FAIL TO RECOGNIZE THAT STATUTORY STANDARDS HAVE BEEN VIOLATED.

This Court has had occasion to point out how Congress has carefully provided for protecting the rights of railroads to their long hauls and how, in spite of repeated efforts by the Commission to have such rights eliminated from the Act, Congress has refused to do so. For example, in *Thompson* v. *United States,* 343 U.S. 549, 554 (1952), the Court refers to the attempts by the Commission to have Congress "delete completely

the short-hauling restriction" and the refusal of Congress to do so. See also the comments of Mr. Justice Frankfurter in his dissenting opinion in *Denver & Rio Grande West. R. Co.* v. *Union Pac.*, 351 U.S. 321, 336-337 (1956). In that case, the Court referred to the *Thompson case* and again stressed the importance of compliance with the short-hauling provisions of the Act, saying (p. 327):

> "We there emphasized the purpose of section 15(4) to bar the Commission from compelling railroads to establish through routes resulting in trunkline 'short-hauls' without faithful observance of restrictive conditions imposed by that section."

Appellants recognize that if there is an already existing "through route" the restrictions in section 15(4) do not apply, because these restrictions would have effect only where a through route would be established by the Commission. Here, however, the Commission by its order seeks to establish a new through route, without complying with the requirements in section 15(4).

It is believed to be utterly illogical and contrary to common sense, to say that CNO&TP is not deprived of its haul which it is performing in its own right as a connecting carrier, when the Commission requires it to give up that haul and to act merely as an agent for another carrier which is the principal in furnishing the service, is the billing carrier, and is the only one publishing the line-haul rate or concurring with other line-haul carriers therein. (Juris. Stat., pp. 8-10).

In other words, the Commission by its order requires a new and different route in so far as the CNO&TP is

concerned, because it requires a new route as to which the CNO&TP has no haul in its own right as a connecting carrier.

It is to be remembered that this Court has clearly pointed out in *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946), that:

> "[a]n agency may not finally decide the limits of its statutory power. That is a judicial function."

See also *East Texas Motor Fr. Lines* v. *Frozen Food Express*, 351 U.S. 49, 54 (1956), *United States* v. *Carolina Freight Carriers Corp.*, 315 U.S. 475, 489 (1942), *Dixie Carriers* v. *United States*, 351 U.S. 56 (1956), and *United States* v. *Contract Steel Carriers*, 350 U.S. 409 (1956).

In *Shaffer Transportation Co.* v. *United States*, Docket No. 20, 26 U.S. Law Week 4039, decided on December 9, 1957, this Court in setting aside an order of the Commission said:

> "* * * we would shirk our duty were we summarily to approve the Commission's evaluation of the record without determining that the agency's evaluation had been made in accordance with the mandate of Congress."

The order here under attack is not in compliance with, but is directly contrary to, the "mandate of Congress". The Commission has misconstrued and misapplied the short-hauling provisions of the Act, has contravened the policy and purpose of Congress, and has transcended statutory standards without warrant of law.

II. APPELLEES FAIL TO DISCUSS THE SWITCHING-AGENCY CASES RELIED UPON BY APPELLANTS AND MISCONCEIVE THE AGENCY RELATIONSHIP.

A striking fact in the motions of appellees is their avoidance of any reference to the cases cited by appellants showing that under reciprocal switching arrangements, the carrier performing the switching, CNO&TP, in the present case, is a mere agent of the line-haul carrier. Thus appellees fail to meet or distinguish *Missouri-Pac. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U.S. 366 (1925), in which the Court held that the switching carrier at destination was "simply the agent of the Missouri Pacific [the last line-haul carrier] for the purpose of delivery" and that "The Missouri Pacific was the delivering carrier and is liable as such".

Nor do appellees mention or seek to distinguish *Ezee Flow Corp.* v. *Illinois Central R. Co.*, 287 I.C.C. 281. There the question was as to responsibility for misrouting. The switching carrier "merely performed a switching movement within the Chicago switching district to its connection with the Illinois Central". The latter carrier "performed the entire line-haul service from Chicago", and, as the Commission said, the "Illinois Central, therefore, was responsible as the initial carrier, the switching carrier having acted merely as its agent".

Appellees do not refer to *Automobiles to Southern Ports for Export*, 225 I.C.C. 225, 229, also cited by appellants, in which it was held that the switching line was merely an agent of the line-haul carrier.*

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* There it was shown that the Canadian Pacific the line-haul carrier, "issues its own bills of lading and waybills on traffic from Detroit to the Canadian ports, which traffic is local to its

The railroad appellees (p. 6) admit that when the reciprocal switching arrangement was in effect prior to June 23, 1954, "all lines serving Chattanooga, Tenn., have been able to *reach those industries* as a *terminating* or *originating line-haul carrier* * * *" (Emphasis supplied). They thus must recognize the unmistakable fact that they were in reality the line-haul carriers to and from the industries and the CNO&TP was merely an agent in connection with their line-haul transportation. . .

The railroad appellees further admit that upon the cancellation of reciprocal switching on June 23, 1954, this "action on the part of the CNO&TP effectively localized the firms and industries on its switching tracks at Boyce * * *" (p. 8). They thus must recognize that Cramet and other industries in Boyce on the River track were made "local" to the line of that carrier, and that it then acquired an entirely different status, namely, that of a connecting carrier operating, not as an agent, but performing a haul local to its own line as an independent carrier in its own right.

To take away this haul by the CNO&TP, as the Commission's order requires, and to force this carrier to act merely as a switching agent is to change its char-

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line, with no participation of any other railroad in the service or revenue *except that it absorbs the charges of other lines for switching traffic to it from points within the Detroit switching limits*" (Emphasis supplied). The switching carriers were United States companies. Holding that the United States "switching line is not a party to the joint rate, but is merely an agent of the line-haul carrier", the Commission concluded that such switching service by the United States carrier did not make it an independent participant in the transportation over the Canadian Pacific and that the switching carrier could not, therefore, be held responsible for unlawful discrimination between ports.

acter completely and to deprive it of the haul to which it is entitled and to divisions which it has the right to receive as an independent participating carrier, without compliance by the Commission with section 15(4) of the Act.

III. APPELLEES ERRONEOUSLY FAIL TO RECOGNIZE THAT THE TARIFF EFFECTIVE JUNE 23, 1954, NOT ONLY CHANGED THE RATE SITUATION BUT CONVERTED CNO&TP'S SERVICE FROM THAT AS AGENT TO THAT AS INDEPENDENT CARRIER.

Railroad appellee argue that the "effect of the Commission's order is merely to continue in existence through routes which have been in effect" for many years and not the establishment of a new route (p. 20). The assumption is that the reciprocal arrangement which was in existence prior to June 23, 1954, was altered as to *charges* and not as to routes by the tariff which became effective on June 23, 1954, and that the tariff "merely had the effect of requiring a division of the total freight charges rather than the assessment of a switching charge for the switching service performed insofar as competing carriers were concerned" (p. 19).

Appellees erroneously fail to perceive that the CNO&TP by its tariff, effective June 23, 1954, expressly cancelled the reciprocal switching arrangement which had theretofore existed. The tariff not only banned switching *charges* but stated in no uncertain terms that "CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn."* (Juris.

* As previously stated, the tariff contained an exception applicable only where the Chattanooga rates are different from the Boyce rates but this was a situation practically non-existent. In fact, the rutile ore rates prescribed by the Commission were the same to both Boyce and Chattanooga and rates on other traffic are shown to be the same to both points, no movement of traffic being shown

Stat., Appendix B, p. 20a). Thus CNO&TP clearly provided for the end of switching *service,* and not merely of switching charges, between Chattanooga and Boyce, and provided for a different character of service, namely, as a local carrier participating in joint rates with the line-haul carriers and performing in its own right the haul between Chattanooga and Boyce.

CNO&TP did not, as the lower Court erroneously assumed, have to obtain permission from the line-haul carriers to cancel the reciprocal switching arrangement. As previously noted, it was merely a switching agent under the reciprocal switching arrangement and could end that arrangement, as it did, by the tariff effective June 23, 1954.

Appellees do not refer to, and are unable to escape from *Joseph A. Goddard Realty Co.* v. *New York, C. & St. L. R. Co.,* 229 I.C.C. 497, 498, cited by appellants and holding that the carrier performing the switching can alone cancel reciprocal switching arrangements.

There it was shown that reciprocal switching on the line of the defendant railroad was cancelled by tariff authority on April 6, 1936, but that "The grocery company [a complainant] had received reciprocal switching service on this spur track for many years" (p. 498).

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as to any situation in which the rates are different (R. 25, 109, 123, 210, 240, and 351). Thus the actual effect of the June 23, 1954, tariff was to cancel reciprocal switching and this was recognized by the Court which said that in "reality, the rates from or to Boyce and Chattanooga are so seldom different that the effect of the action [of June 23, 1954] was that on competitive traffic destined to or from Boyce, CNO&TP refused to switch" (App. A, p. 4a, Juris. Stat.). The Commission made a similar finding (p. 445). The actual effect of the tariff was to cancel the reciprocal switching arrangement.

The complainants asked the Commission "to require defendant to restore reciprocal switching service to them" (p. 497). In holding that it had no power to require such restoration of reciprocal switching in view of the provisions of section 15(3) and (4) the Commission said (p. 502):

> "The complaint seeks in effect through routes over other lines to Muncie and the use of defendants line only for a switching operation, which would short haul defendant and bring the situation squarely within the limitation upon our power to prescribe through routes. In other words, we are asked to do under section 1 that which under section 15(4) we are directly prohibited from doing."

It is plain from the decision that in that case, as in the present one, the tariff cancelling reciprocal switching terminated the preexisting switching practice, irrespective of how many years it had been in effect. Also the decision makes clear that although during that past period there had been such an arrangement it could not be relied upon, in view of the change brought about by the tariff, as continuing a through route, but that instead the haul of the defendant carrier after termination of the switching arrangement could not be taken away from it without complying with the restrictions in section 15(4) of the Act.*

Railroad appellees seek to excuse the lower Court's statement that the "action on the part of plaintiffs having been *suspended by the Commission* for investi-

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* See also *Hillsboro Coal Co.* v. *C.C.C. and St. L. Ry. Co.*, 63 I.C.C. 401 in which a reciprocal switching arrangement had been ended by the switching carrier and restoration of the switching arrangement, it was held, could not be required without contravening the short-hauling provisions of the Act.

gation, the burden is upon plaintiffs to show its action is consistent with the public interest" (Emphasis supplied. Juris. Stat. App. 8a). Examination of the decision shows that the lower Court was under the erroneous impression that the question of reciprocal switching involved a *suspension* proceeding when this is clearly not the fact (Juris. Stat., pp. 11-13).

IV. APPELLEES ERRONEOUSLY OVERLOOK THAT THE COMMISSION'S ORDER REQUIRES INVASION OF CNO&TP's TERMINAL FACILITIES WITHOUT STATUTORY AUTHORITY.

The Commission's order requiring CNO&TP to become a mere agent for the line-haul carriers in the transportation service between Chattanooga and Boyce not only does violence to the short hauling provisions of section 15(4) but requires in substance invasion of CNO&TP's terminal facilities without complying with section 3(5) of the Act.

By section 3(5) Congress has clearly shown its purpose to protect railroad terminal facilities from invasion by other railroads unless certain findings are made, and there is no semblance of such findings in the present case.*

Railroad appellees seek to argue (pp. 24-25) that because appellants called attention before the Commission to the fact that the statement by the Examiner that the CNO&TP was asked to permit use of its terminals and tracks at Chattanooga and Boyce by other rail carriers was incorrect and that appellants stated that the issue was as to requiring "reciprocal switching", this precludes consideration of section 3(5) in the present proceeding.

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* This is clear from the *Hastings case*, 69 I.C.C. 489, and similar cases cited in the Jurisdictional Statement, pages 21, 22.

The statement before the Commission is in fact confirmatory of the very contention here made, namely, that the opposing railroads made no pretense of seeking to justify a reciprocal switching order under the provisions of section 3(5), offered no evidence in support of such a position, and could not, therefore, rely upon it as an excuse for the Commission's action.

It is interesting to note that the appellee, Cramet, does not join the railroad appellees in their contention.

Appellants have shown* not only that the Commission's order cannot be sustained under the theory of section 3(5) but also that it cannot be upheld on the theory of unlawful discrimination under other provisions of section 3.

Admittedly, there has been no finding by the Commission of unlawful discrimination. The well-established rule is that one carrier cannot be required to perform reciprocal switching for another, or to turn its facilities over to another under reciprocal switching arrangements in the absence of a showing of undue prejudice

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* Railroad appellees contend (p. 24) that in *Pennsylvania Co.* v. *United States*, 236 U.S. 351 (1915), this Court held that the provisions of section 3 were inapplicable under "similar circumstances" (p. 24). Appellees misconceive the decision. The provisions of section 3(5) of the present Act were not even in existence at the time of that decision. Moreover, the case turned on discrimination in that the switching line (the Pennsylvania Railroad) interchanged traffic and switched for three other railroads but refused to switch for BR&P. There is no such situation as to the CNO&TP here. The Court said "All that the Commission ordered was that the Company [Pennsylvania] desist from the discriminatory practice here involved."

or unjust discrimination in violation of section 3 of the Act, and there is no such finding.*

Moreover, while the appellees fail to mention the situation at North Chattanooga, the fact is that the cancellation of reciprocal switching as to the Boyce industries was like the cancellation of reciprocal switching some years before that time as to the North Chattanooga industries, and that service under joint rates has been entirely satisfactory, with no complaint from the thirty-six industries served (Juris. Stat., p. 21). Here Cramet and other industries in Boyce pay the same rates as industries in Chattanooga and North Chattanooga, and cannot claim any rate injury. Nor can they claim any service injury. Furthermore, the opposing line-haul carriers with lines reaching Chattanooga and having joint rates with the CNO&TP to and from the Boyce industries can solicit traffic over their routes under the joint rates applicable and obtain movement of traffic without any rate disadvantage, since the rates over those routes are the same as via the Southern System routes.**

---

* The Commission, for example, said in *Hylton Flour Mills* v. *Los Angeles & S. L. R. Co.*, 152 I.C.C. 81, 82, "We have repeatedly found that, in the absence of unjust discrimination or undue prejudice, we cannot require a carrier to absorb the switching charges of another." See also *Barber Asphalt Co.* v. *L. & N. R. R. Co.*, 88 I.C.C. 307; *Du Pont de Nemours Powder Co.* v. *P. R. R. Co.*, 50 I.C.C. 203; *Hunt, Helm, Ferris & Co.* v. *C. & N. W. Ry. Co.*; 68 I.C.C. 283, and *Hastings Commercial Club* v. *C. M. & St. P. Ry. Co.*, 69 I.C.C. 489, 496.

** Railroad appellees, having themselves largely protected their long-haul routes, are now endeavoring to criticize the Southern Railway for seeking to protect its long-haul route here involved. They cite various cases involving the Southern Railway in this connection. (p. 3). They do not refer to numerous cases showing where they have sought to protect their own long hauls. Some examples

The invasion of the CNO&TP terminal facilities required by the Commission's order not only flies in the face of the short-hauling restriction of section 15(4) but is without support under any other section of the Act. The Commission has made no findings, and there is no evidence, to support the part of the order here under attack. It is contrary to the controlling facts, and is basically unsound because of a misunderstanding and misapplication of the pertinent provisions of the Interstate Commerce Act. See the *Thompson case*, 343 U.S. 549, 561, and *United States* v. *Contract Steel Carriers*, 350 U.S. 409, 412.

CONCLUSION

Appellants respectfully submit that the motions of the railroad appellees and of the appellee, Cramet, Inc., (which are not supported by any motion of the United States or the Interstate Commerce Commission) are based on fallacious assumptions and erroneous interpretation of the statute and are without merit. They respectfully submit that the motions of appellees should, therefore, be denied, that the case should be considered by the Court on briefs and oral argument,

---

are *Routing Via Hampton & B. R.*, 148 I.C.C. 547 (1928) (Atlantic Coast Line authorized to eliminate intermediate carrier); *Georgia & F. R.* v. *Atlantic Coast Line R. Co.*, 191 I.C.C. 489 (1933) (Attempt of Atlantic Coast Line, Clinchfield Railroad and Charleston & Western Carolina to close various routes); *Lumber From and To Hampton & Branchville R. Co.*, 264 I.C.C. 419 (1946) (Atlantic Coast Line authorized to eliminate routes).; *Routing From Or To Cantonment, Fla.*, 288 I.C.C. 708 (1953) (L&N authorized to eliminate certain routes); *Simons* v. *Central of Georgia Ry. Co.*, 298 I.C.C. 433 (1956) (C. of Ga. long-haul recognized); and *Seaboard Air Line R. Co. Routing Cancellation*, 301 I.C.C. 129 (1957) (Seaboard Air Line authorized to cancel certain routes).

and that that part of the Commission's order herein sought to be set aside should be held to be invalid.

Respectfully submitted,

HENRY L. WALKER,
ARTHUR J. DIXON,
JAMES A. BISTLINE,
Southern Railway Building,
Washington, D. C.

R. GRANVILLE CURRY,
631 Southern Building,
Washington, D. C.
For Appellants.

December 23, 1957.

PROOF OF SERVICE

I, R. Granville Curry, one of the attorneys for appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 23rd day of December, 1957, I served copies of the foregoing reply on the several parties hereto, as follows:

(1) On the United States, by mailing a copy in a duly addressed envelope, with first-class mail postage prepaid, to—

The Solicitor General,
Department of Justice,
Washington 25, D. C.

Victor R. Hansen, Esq.,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

James E. Kilday, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

Charles R. Esherick, Esq.,
Attorney, Department of Justice,
Washington 25, D. C.

and by mailing a copy in a duly addressed envelope, with airmail postage prepaid to—

Lester S. Parsons, Jr., Esq.,
United States Attorney,
For the Eastern District of Virginia,
Federal Building,
Richmond, Va.

(2) On the Interstate Commerce Commission by mailing copies duly addressed with first-class postage prepaid to—

Robert W. Ginnane, Esq.,
General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

Samuel R. Howell, Esq.,
Associate General Counsel,
Interstate Commerce Commission,
Washington 25, D. C.

(3) On intervening defendants by mailing copies duly addressed with air mail postage prepaid to their respective attorneys of record, as follows—

John W. Adams, Jr., Esq.,
104 St. Francis Street,
Mobile 8, Ala.

Charles P. Reynolds, Esq.,
147 Granby Street,
Norfolk 10, Va.

W. A. Miller, Esq.,
930 Broadway,
Nashville, Tenn.

Clifford T. Coomes, Esq.,
908 W. Broadway,
Louisville 1, Ky.

R. B. Claytor, Esq.,
c/o Norfolk & Western Ry. Co.,
Roanoke, Va.

R. B. Gwathmey, Esq.,
c/o Atlantic Coast Line R. R. Co.,
Wilmington, N. C.

Walter C. Scott, Jr., Esq.,
P.O. Box 642,
Savannah, Ga.

John S. Davenport, III, Esq.,
1300 Travelers Building,
Richmond, Va.

Robert N. Burchmore, Esq.,
Burchmore, Good, and Bobinette,
2106 Field Building,
Chicago, Ill.

and by mailing a copy in a duly addressed envelope with first-class mail postage prepaid to—

Martin A. Meyer, Jr., Esq.,
Investment Building,
Washington, D. C.

R. GRANVILLE CURRY

Motion to Affirm of Railroad Appellees

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 379

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

JOHN W. ADAMS, JR.
104 St. Francis Street
Mobile 8, Alabama
CHARLES P. REYNOLDS
147 Granby Street
Norfolk 10, Virginia
CLIFFORD T. COOMES
908 W. Broadway
Louisville 1, Kentucky
R. B. CLAYTOR
c/o Norfolk & Western Ry. Co.
Roanoke, Virginia
R. B. GWATHMEY
c/o Atlantic Coast Line R. Co.
Wilmington, N. C.
MARTIN A. MEYER, JR.
Investment Bldg.
Washington, D. C.
WALTER C. SCOTT, JR.
P. O. Box 642
Savannah, Georgia
Attorneys for Railroad

HITCH, MILLER & BECKMANN
P. O. Box 642
Savannah, Georgia

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957

No. 579

SOUTHERN RAILWAY COMPANY AND THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY, *Appellants*,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL., *Appellees*

On Appeal from the United States District Court for the Eastern District of Virginia

MOTION TO AFFIRM

COME NOW the railroads, listed in Appendix "A" hereto, intervening defendants in the court below and appellees in this appeal, and pursuant to Rule 16 (1) (c) of the Revised Rules of this Court, respectfully move the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument.

STATEMENT

This is a direct appeal under 28 U.S.C. 1253 and 2101(b) from that portion of the final judgment entered on July 12, 1957, by a three-judge district court convened under 28 U.S.C. 2284 and 2325, dismissing the complaint of appellants which sought to enjoin and to set aside a portion of an order of the Interstate Commerce Commission (hereinafter referred to as Commission) entered in its Docket No. 31737, *Cramet, Inc.* v. *The Alabama Great Southern Railroad Company, et al.*, requiring the restoration by The Cincinnati, New Orleans and Texas Pacific Railway Company (hereinafter referred to as CNO&TP) of firms and industries located on its switching tracks in an area called Boyce, Tennessee, to the Chattanooga, Tennessee, reciprocal switching limits. The judgment from which the appeal is taken is reproduced as Appendix "B" hereto with that portion involved shown in italics. Similarly, the order of the Interstate Commerce Commission entered May 4, 1956, in its Docket No. 31737 is reproduced as Appendix "C" hereto with that portion directly involved shown in italics. The complaint of Cramet, Inc., was consolidated for hearing with two other related proceedings which had arisen out of the same general controversy, but which had been initiated prior to the filing of the Cramet complaint. Such related proceedings were those in I.&S. Docket No. 6284, *Rutile Ore from Gulf and South Atlantic Ports to Tennessee*, and Docket No. 31677, *Central of Georgia Railway Company* v. *The Cincinnati, New Orleans and Texas Pacific Railway Company.*

The consolidated proceedings stemmed from and were the outgrowth of efforts of the CNO&TP to exclude other carriers from the area known as Boyce, Tennessee, in the competitive commercial sense so that traffic destined to or from industries and locations on its switching tracks at Boyce could not be handled at the lowest available rates via routes of lines competing with those of the Southern Railway System, of which the CNO&TP is a part. This effort is representative of a general program inaugurated by the Southern Railway constituent lines to appropriate and thereafter to monopolize traffic to the greatest possible extent (Tr. pp. 57-59). Reported decisions in a few cases exemplifying such efforts are *Salt Cake from Bessemer City, N.C. to Foley, Fla.*, 298 I.C.C. 544; *Cancellation of Routing, Paper, Gainesville M. R. Co.*, 299 I.C.C. 107; *Carolina, C&O Ry. Co.* v. *Southern Ry. Co.*, 299 I.C.C. 335 (affirmed 153 F. Supp. 57, now on appeal to this Court); *Routing, Coal from Origins on Louisville & N. R.*, 300 I.C.C. 125; *Tennessee, A&G Ry. Co., Cancellation of Routing*, 300 I.C.C. 515.

Thus, it is apparent that the situation involved is not an isolated instance, but is part of the over-all program of the Southern Railway System constituent lines to eliminate their competition wherever possible.

PROCEEDINGS BEFORE THE COMMISSION AND HISTORY OF THE CASE

The consolidated proceedings before the Commission is styled *Rutile Ore from Gulf and South Atlantic Ports to Tennessee*, reported at 298 I.C.C. 439. As shown therein, the proceedings arose as a result of suspension by the Commission of schedules publishing

a reduced rate on rutile ore from Gulf and South Atlantic ports to Boyce, Tennessee, restricted to apply only over the Southern Railway System long haul routes. Subsequent to that suspension and the ordering of an investigation by the Commission, Central of Georgia Railway Company filed its complaint in Docket No. 31677 seeking a cease and desist order to prevent a continuation of the practices engaged in by the CNO&TP in its exclusionary rate activities, enabled and brought about through the cancellation of reciprocal switching at Boyce on June 23, 1954. It was alleged in this complaint that CNO&TP was engaging in practices which were violative of Sections 1 (4) and 3 (4) of the Interstate Commerce Act (49 U.S.C. 1(4) and 3(4)) in that other lines were permitted to participate in the proposed rates involved in I. & S. Docket No. 6284, but Central of Georgia Company was not, and that unless prevented by order of the Commission, the CNO&TP would publish other rates also excluding the Central of Georgia Railway, from participation therein. The Nashville, Chattanooga & St. Louis Railway,[1] Tennessee, Alabama & Georgia Railway Company and Atlantic Coast Line Railroad Company intervened in support of the complainant.

The complaint of Cramet, Inc., in Docket No. 31737 was subsequently filed against all carriers (including the railroad appellees herein) which were parties to the existing rates from the ports to Boyce, Tennessee, alleging violation of Sections 1 and 3 of the Inter-

[1] The Nashville, Chattanooga & St. Louis Railway has now been merged into the Louisville and Nashville Railroad Company, pursuant to authority granted by the Interstate Commerce Commission in Finance Docket No. 18845.

state Commerce Act (49 U.S.C. 1 and 3), and seeking an order commanding restoration of Boyce, Tennessee, to the reciprocal switching limits of Chattanooga, Tennessee; the prescription of reasonable rates via all present routes to and from Boyce no higher than those maintained over any one such route; and the award of reparation on past shipments of rutile ore to the basis prescribed for the future. Central Soya Company, Inc., which also had built a new plant at Boyce, and the Chattanooga Chamber of Commerce intervened on behalf of the complainant in this Docket as well as in No. 31677.

Boyce, Tennessee, has historically been within the switching limits of the City of Chattanooga, Tennessee, the Boyce area being partly within and partly without the corporate limits of the City of Chattanooga (Tr. pp. 22, 75-77; Exhibit No. 8). It is adjacent to the Southern Railway System's Citico Yard and in fact the switching track by which the CNO&TP serves Cramet, Central Soya and other Boyce industries actually breaks out of the classification yard (Tr. p. 288; Exhibit No. 8). Chattanooga, Tennessee, is served by six line-haul carriers, including Central of Georgia Railway Company, the Tennessee, Alabama and Georgia Railway Company, the Louisville and Nashville Railroad Company (formerly The Nashville, Chattanooga & St. Louis Railway), Southern Railway Company, The Alabama Great Southern Railroad Company, and the CNO&TP, the latter three carriers being lines of the Southern Railway System.

Physical track connections and joint interchange arrangements were established and have been in effect for many years by the carriers serving Chatta-

nooga, including the CNO&TP (Tr. pp. 18-19, 100, 116-117). Joint rates and through routes with established divisions or percentages have also existed for many years (Tr. pp. 19-20, 360, 102, 117). By means of this situation, joint rates and through routes to and from firms and industries on the switching tracks of the CNO&TP in the Boyce area have been available to shippers and receivers of freight destined to or forwarded from Boyce industries. By virtue of reciprocal switching arrangements, all lines serving Chattanooga, Tennessee, have been able to reach those industries as a terminating or originating line-haul carrier and the reciprocal switching arrangements made it impossible for the CNO&TP to so adjust rates over the line-haul routes of the Southern Railway System lines as to make non-competitive the routes of competing carriers reaching Chattanooga. By virtue of reciprocal switching, the Boyce industries have had the advantage of generally unrestricted rates, routes and transit arrangements so that car supply and other transportation services of all Chattanooga railroads were available to them (Tr. pp. 218).

Having been pointed out the advantages of the reciprocal switching arrangements in effect in the Boyce area, a plant site in that area was ultimately purchased by Cramet, Inc., on or about September 3, 1953 (Tr. p. 163). Because reciprocal switching was not available at another location, a site valued at nearly $100,000 and offered Cramet for only one dollar had been refused (Tr. pp. 147-148). Subsequent to the purchase of the Boyce property, grading and construction of a titanium plant was undertaken which, completed, represents an investment in excess of $25,000,000 (Tr. p. 157). A controlling factor in the selection of the site

for the Central Soya Plant in the Boyce area was also the fact that reciprocal switching arrangements had been in effect for many years, thereby making available to the plant the services of all Chattanooga railroads with flexible transit arrangements and generally unrestricted rates and routes (Tr. pp. 218-219).

Soon after the construction of the Cramet plant had commenced and in fact on June 23, 1954, the CNO&TP cancelled all such switching arrangements except in instances where the applicable rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce (Tr. P. 24).[2] Inasmuch as in reality the rates from or to Boyce and Chattanooga are seldom, if ever, different, the effect of such

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[2] The tariff provision reads as follows (Exhibit No. 2; 298 I.C.C. 449):

ITEM 15. APPLICATION OF RATES TO AND FROM INDUSTRIES AND LOCATIONS AT BOYCE, TENN.

(1) The CNO&TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2)(a) Industries and locations on the CNO&TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits, and the CNO&TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

(b) Where there is an applicable commodity rate or mileage scale rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same commodity rate or mileage scale rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn., or

(c) When there is an applicable class rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same class rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn.

publication was that on competitive traffic destined to or from Boyce, Tennessee, the CNO&TP would refuse to switch (Tr. pp. 24-26).

This action on the part of the CNO&TP effectively localized the firms and industries on its switching tracks at Boyce and set the stage for the commercial closing by exclusionary rate adjustments of routes theretofore open to the shippers and receivers at Boyce on the same competitive basis.

Rutile ore, the commodity over which the controversy arose, is a raw material used by Cramet in the manufacture of titanium metal. When shipments of this commodity began to move into the Boyce plant from Australian origins through the ports, the only applicable rates were the Class rates which were available to Cramet over the routes of all carriers serving Chattanooga. At the time of the hearing on June 6-7, 1955, a total of eighty-eight cars of rutile ore had been imported by Cramet through the ports of Savannah, Georgia, and Charleston, South Carolina (Tr. pp. 26, 255). Seventy-three cars moved through the port of Savannah, fifty-seven of which were handled by the route of the Central of Georgia Railway to Chattanooga, thence CNO&TP; two cars were handled via Central of Georgia to Atlanta, thence Southern Railway and CNO&TP and the remaining fourteen cars were handled via the route of the Southern Railway to Chattanooga, thence CNO&TP (Tr. p. 28). All fifteen cars transported through the port of Charleston were handled via the route of the Southern Railway; four to Oakdale, Tennessee, thence CNO&TP and the remainder to Chattanooga, thence CNO&TP (tr. pp. 283-286).

During the spring of 1954, Cramet sought a reduction in the rates on imported rutile ore and in the negotiations which followed, the Central of Georgia Railway suggested a rate of $8.50 per ton to be applicable from shipside, from Savannah to Chattanooga (Tr. p. 33). By such a rate, the Central of Georgia and other lines participating in routes from Savannah, could reach the Cramet plant at Boyce through the then existing reciprocal switching. After the cancellation of reciprocal switching through the means already mentioned, the Southern Railway System on August 9, 1954, proposed the rate of $8.50 from South Atlantic and Gulf ports to Chattanooga and to Boyce, to apply from shipside, with routing to be restricted to the lines of the Southern Railway System when from ports served by the Southern and restricted to routing affording those lines their maximum hauls from other ports (Tr. pp. 30-34). The cancellation of reciprocal switching was an integral part of this proposal, since only by virtue of such cancellation was the proposal possible. The Central of Georgia then proposed the establishment of a proportional rate to Chickamauga (an intermediate point) which with the class rate factor beyond, produced a combination rate of $8.50, thereby meeting the Southern's proposal (Tr. p. 34).

This action on the part of the Central of Georgia Railway resulted in instructions being issued by the Southern Railway System that they would publish a through rate from Savannah to Chattanooga and Boyce with the restricted routing heretofore explained, ten cents per ton lower than any combination published for the account of the Central of Georgia (Tr. pp. 34-36, 39-40). Ultimately, Central of Georgia un-

dertook a revision of the proportional rate to Chickamauga so as to produce a combination rate of $7.50 to Boyce and the Southern announced a single-factor through rate of $7.40 (Tr. 40-41). Both of these rates and the rates from the other ports proposed by Southern Railway System were published to become effective on November 9, 1954.

Before any of these rates became effective, however, protests and petitions for suspension were filed against the rates from Savannah, predicated primarily upon disruption of port equalization. Among such protests and petitions for suspension was one filed on behalf of the Southern Railway and CNO&TP which sought suspension not only of the Central of Georgia Railway proportional rate, but also of their own single-factor through rate from Savannah to Chattanooga and Boyce on the ground that such rates were below minimum reasonable rates. (Tr. pp. 41-42). Knowing full well that this protest and petition for suspension was motivated by a desire on the part of the Southern and CNO&TP to secure a cargo of rutile ore then on the high seas through the port of Charleston, the Central of Georgia Railway, in its answer, requested that if any of the rates were suspended that the entire adjustment from all ports be suspended (Tr. pp. 42-43). All of the rates were therefore suspended and the issues involved disposed of by the Commission in I. & S. Docket No. 6284.

As has already been related, the complaints in Docket No. 31677 and Docket No. 31737 stemmed from the action of the Southern Railway and CNO&TP in their attempt to cancel through rates in the manner described.

After hearing and the consideration of exceptions and replies thereto, the Commission, by Division 2, entered its report and orders on May 4, 1956. The ultimate findings in that report are as follows (298 I.C.C. 448):

"In Investigation and Suspension Docket No. 6284, we find that it is not shown that the proposed cancellation of routes, in connection with the establishment of the proposed reduced rates, is consistent with the public interest, and that the proposed schedules therefore are not shown to be just and reasonable.

"In No. 31677, we find that the defendants' refusal to join in the establishment and maintenance of reduced rates over routes presently maintained from South Atlantic and Gulf ports to Boyce, the same as when the defendant receives a line haul into Chattanooga, is unjust and unreasonable.

"In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

"We further find in No. 31737, that the rates presently in effect on rutile ore, in carloads, from the various South Atlantic and Gulf ports embraced herein to Chattanooga and Boyce were, are, and for the future will be unjust and unreasonable to the extent that they exceeded, exceed, or may exceed rates, subject to a minimum of 80,000 pounds, from shipside, of $8.50 from the various ports embraced herein other than from

Newport News and Norfolk, and of $9.50 from the latter two ports, plus applicable increases as authorized in Ex Parte Nos. 175 and 196."

* * * * * * * * * *

"Orders requiring cancellation of the schedules proposed in I.&S. No. 6284, and the establishment of an adjustment as prescribed in No. 31737, will be entered. In view of the requirements of the order entered pursuant to the findings in No. 31737, the entry of an order in No. 31677 is unnecessary. The establishment of rates as thus required will avoid and remove any undue prejudice and preference as alleged in No. 31737."

These ultimate findings together with all subsidiary findings and conclusions contained in the report were incorporated by reference and implemented by the separate orders entered in I. & S. Docket No. 6284 and Docket No. 31737 on May 4, 1956. The order in I. & S. Docket No. 6284 required cancellation of the involved schedules on or before June 11, 1956, and the order in Docket No. 31737 ordered establishment by the defendants "according as they participate in the transportation" to establish and thereafter to maintain rates in accordance with the finding quoted above on or before August 10, 1956, upon not less than 30 days' notice and further ordered the CNO&TP to establish on or before the same date upon the same notice and thereafter to maintain and apply switching charges, and provisions relating thereto, on carload traffic between Chattanooga and Boyce "that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga."

By order dated July 6, 1956, the effective date of the order in Docket No. 31737 was postponed until August 27, 1956. On July 16, 1956, Southern and CNO&TP filed a petition for reopening, reconsideration and reargument before the entire Commission. On July 25, 1956, the Commission stayed the outstanding order of Division 2, pending disposition of the petition. Replies to the petition were filed thereafter and, on October 1, 1956, the entire Commission entered an order denying the petition for reopening, reargument and reconsideration, in which it stated:

> "*It is ordered,* That the petition be, and it is hereby, denied, for the reasons that the findings of fact made in the report and the conclusions of the Commission based thereon are fully supported by the evidence; and that the petition does not show substantial grounds to warrant reopening the proceedings for reargument and reconsideration.
>
> "*It is further ordered,* That the order entered in I. & S. No. 6284 and 31737 on May 4, 1956, requiring the carriers to take certain action, which, pursuant to Section 17(8) of the Interstate Commerce Act, was stayed pending disposition of the petition, be, and it is hereby reinstated and modified so as to postpone to November 21, 1956, the effective date of the order in I. & S. 6284 requiring respondents to cancel certain schedules upon not less than one day's notice to this Commission and to the general public; and to December 20, 1956, in No. 31737, requiring the defendants to take certain action upon not less than 30 days' notice."

THE PROCEEDING BEFORE THE DISTRICT COURT

On November 16, 1956, the appellants (CNO&TP and the Southern Railway Company) filed a complaint in the United States District Court for the Eastern District of Virginia, attacking directly only the provisions of the Commission's order of May 4, 1956, as amended by subsequent stay orders in Docket No. 31737, relating to switching, as heretofore mentioned. The specific provisions directly attacked are those contained in the third ordering paragraph of the order of May 4, 1956, shown in Appendix "C" hereto. Appellants prayed the Court, to issue a temporary restraining order, an interlocutory injunction, and upon final hearing enter a decree permanently suspending, enjoining, setting aside and annulling the order of the Commission under attack. Pursuant to appellants' request, Honorable Sterling Hutcheson, United States District Judge, entered a temporary restraining order on November 16, 1956, temporarily restraining "the defendants * * * from making effective those parts of the orders of the Interstate Commerce Commission requiring the establishment of reciprocal switching at Boyce, Tenn., namely, the third ordering paragraph of the order of May 4, 1956, and the first and second ordering paragraph of the order of October 1, 1956, in its Docket No. 31737, *Cramet, Inc.* v. *Alabama Great Southern Railroad Company, et al.*," and directed that said restraining order continue in force and effect "only until the hearing and determination by the full court of the validity of said order."

Although appellants sought and obtained the temporary restraining order designed to retain the status quo, on November 16, 1956, there was filed with the

Interstate Commerce Commission a tariff in which there was published in connection with the rates prescribed in the second ordering paragraph of the Commission's order of May 4, 1956, in Docket No. 31737, restrictive routing which had been condemned by the Commission's findings and order of May 4, 1956, in I. & S. Docket No. 6284. This action could not have been taken without the benefit of the temporary restraining order and showed clearly that appellants were unwilling to participate with competing carriers as required by the Commission's orders.

Under the circumstances, upon intervention in accordance with 28 U.S.C. 2323, the Railroad appellees herein asserted a counter-claim to require obedience to the provisions of the Commission's orders prescribing publication of certain rates via the same routes over which the class rates on rutile ore were applicable.

On June 19, 1957, the District Court handed down its opinion denying the relief sought by appellants, dissolving the temporary restraining order and granting the relief sought by the counter-claim. That opinion is now reported as *Southern Railway Company* v. *United States,* 154 F. Supp. 562. Final judgment in accordance with the opinion was entered on July 12, 1957.

While this appeal is taken only from that portion of the District Court's judgment denying the relief sought in appellants' complaint relating to the third ordering paragraph of the Commission's order of May 4, 1956, it is apparent that the reciprocal switching therein involved is the key to their entire program of restricting routes to Boyce, Tennessee. Events which have transpired since the Commission's report

and orders at issue and which were the subject of the counterclaim in the suit before the District Court show clearly that the Commission was correct in requiring Boyce to be restored to the Chattanooga switching limits. Otherwise restrictive routing will be further imposed by the CNO&TP, giving rise to further proceedings before the Commission.

ARGUMENT

Appellants rely upon five principal assignments of error in support of their appeal (Juris. St. pp. 4-5). Only four of them were urged in argument and it would therefore appear that the fifth has been abandoned. However, out of an abundance of caution, all five will be discussed since it is submitted that none of them has sufficient substance to merit serious consideration.

1. Appellants contend that the District Court erroneously overlooked the finality of the CNO&TP tariff cancelling reciprocal switching effective June 23, 1954, and erroneously assumed it to be under suspension. It is urged that since the Commission did not suspend the schedules which effectively cancelled reciprocal switching on June 23, 1954, prior to the effective date thereof, that the Commission was thereafter precluded from ordering its restoration except upon giving due regard to the provisions of Section 15(4) of the Interstate Commerce Act (49 U.S.C. 15(4)).[3] This contention completely overlooks the fact

[3] Section 15(4) reads as follows:

"(4) In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in each

that the cancellation of reciprocal switching alone did not have the effect of cancelling routes. Hence, restoration of reciprocal switching does not have the effect of creating new routes. To contend that the Commission was precluded from correcting this situation so as to preserve existing routes on a competitive rate basis is patently unsound and will be more fully discussed hereinafter. At this juncture, however, it seems sufficient to point out that the Commission's failure to suspend the switching schedules is not a final determination of their lawfulness so as to become *res judicata* in a subsequently brought complaint proceeding. In an appropriate proceeding, where it finds that the cancellation or refusal of a carrier to provide reasonable and necessary services, including switching service at an appropriate charge, is unjust and unreasonable or discriminatory and such finding is supported by substantial evidence, the Commission may properly require those services or prescribe that charge. *Great Northern Ry. Co.* v. *United States*, 81 F. Supp. 921, 925, affd. 336 U.S. 933; *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*,

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route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic."

284 I.C.C. 505; *Atchison, T. & S F. Ry. Co.* v. *United States,* 279 U.S. 768, 776-777.

The allegations of confusion on the part of the District Court is amply refuted by a casual reading of the court's opinion. The quotation upon which appellants rely cannot be taken alone and characterized as the sole basis of the Court's consideration. For example, the following illustrates the court's complete understanding of the situation involved:

> "On June 23, 1954, after construction had commenced, C.N.O.& T.P. cancelled the reciprocal switching arrangements then in effect, except in instances where the rate from or to Chattanooga is different from the line-haul rate on a like shipment from or to Boyce". (154 F. Supp. 564).
>
> • • • • • • • • • • •
>
> "The C.N.O.& T.P., by its action of June 23, 1954, in denying competing carriers reciprocal switching services from Chattanooga to Boyce and the publication by Southern of its tariff of November 16, 1956, result in depriving shippers at Boyce of the advantages of competitive services and competitive carriers are foreclosed from participating in transporting freight to Boyce unless there is a division of the line-haul rate with Southern. A restoration of the reciprocal switching arrangements in effect for many years would relieve this situation." (154 F. Supp. 565).

The above clearly illustrates the fact that the District Court did not assume that the switching tariff involved was under suspension.

2. Appellants also contend that the District Court and the Commission misconstrued Section 15(4) of the Interstate Commerce Act in holding that the short-

hauling provisions of that Section have no application to the issues involved. (Juris. St. pp. 14-16).

We already have adverted to the fact that the cancellation by the CNO&TP of reciprocal switching alone did not have the effect of cancelling pre-existing through routes. It merely had the effect of requiring a division of the total freight charges rather than the assessment of a switching charge for the switching service performed insofar as competing carriers were concerned. In addition thereto, such cancellation deprived the shippers of the advantages of competitive services of all Chattanooga railroads, including transit arrangements, car supply and other transportation services.

Under such circumstances it is apparent that the Commission and the Court were not establishing new through routes and joint rates under Section 15(3) of the Interstate Commerce Act (49 U.S.C. 15(3))[4]

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[4] Section 15(3) provides in part as follows:

"The Commission may, and it shall whenever deemed by it to be necessary or desirable in the public interest, after full hearing upon complaint or upon its own initiative without complaint, establish through routes, joint classifications, and joint rates, fares, or charges, applicable to the transportation of passengers or property by carriers subject to this part, or by carriers by railroad subject to this part and common carriers by water subject to part III, or the maxima or minima, or maxima and minima, to be charged, and the divisions of such rates, fares, or charges as hereinafter provided, and the terms and conditions under which such through routes shall be operated. * * * If any tariff or schedule canceling any through route or joint rate, fare, charge, or classification, without the consent of all carriers parties thereto or authorization by the Commission, is suspended by the Commission for investigation, the burden of proof shall be upon the carrier or carriers proposing such cancelation to show that it is consistent with the public interest, without regard to the provisions of paragraph (4) of this section."

in requiring restoration of reciprocal switching and, therefore, have not misconstrued or erred in applying the provisions of Sections 15(3) and (4). The effect of the Commission's order is merely to continue in existence through routes which have been in effect for over fifty years. That being the case, it is apparent that Section 15(4) has no application. See *U. S.* v. *Great Northern Ry. Co.,* 343 U. S. 562, 572, 573, 575; *Virginian Ry.* v. *United States,* 272 U. S. 658.

3. It is further contended that the District Court erroneously held that the findings of the Commission and the evidence were sufficient to sustain the reciprocal switching order even though no unlawful discrimination had been found to exist under Section 3 of the Interstate Commerce Act, and no legal injury had been shown (Juris. St. pp. 16-17).

Appellants take the position that the Commission made only one finding in connection with the switching issue, that one being as follows (298 I.C.C. 448):

> "In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendants as a line-haul carrier to or from Chattanooga, is unjust and unreasonable."

This contention overlooks other subsidiary findings contained in the Commission's report. They are as follows:

"The Jackson Manufacturing Company, located in the vicinity of Boyce, just across the main-line rails from the station house at that point, is served by the Belt Railway, a subsidiary of The Alabama Great Southern Railroad Company, one of the Southern's constituent lines. This industry is treated as within the switching limits and is accorded the benefit of reciprocal switching requiring a longer switching movement than is required for industries lying across the main-line tracks of the Cincinnati, New Orleans & Texas Pacific. Another industry, the Quaker Oats Company, is served by a switch track connecting with Southern in the classification yard at or near the point at which interchange is made with connecting lines. This switch track, like that serving Cramet and Central Soya, extends from the Southern's main line at a point within the corporate limits, but the industry itself is outside of the corporate limits. The industry is treated as within the Chattanooga switching limits and has the benefit of reciprocal switching. This firm is in competition with Central Soya, as are two or three other firms handling similar products that are within the Chattanooga switching limits. (298 I.C.C. 447).

* * * * * * * * * * *

"The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S.F. Ry. Co.*, 284 I.C.C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential." (298 I.C.C. 447-448).

There is no dispute with respect to the Commission's not having made a finding under Section 3 of the Interstate Commerce Act, but it is submitted that there was no reason or necessity therefor. The tariff provisions relating to switching did not have the effect of closing long existing through routes, nor, in fact, did they remove industries and locations at Boyce from the Chattanooga switching district. The tariff specifically says (*supra*, p. 7):

> Industries and locations on the CNO&TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits * * *.

By virtue of this situation, it was incumbent upon the Commission only to make a finding that the action of the CNO&TP in failing to provide switching services at a switching charge was unjust and unreasonable under the provisions of Sections 1(4), 1(5), and 1(6) and to implement such findings with an appropriate order in accordance with Section 15(1) (49 U.S.C. 1 (4), 1(5), 1(6), and 15(1)).[5] This the Commission has

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[5] Section 1(4), 1(5), 1(6) and 15(1) provide in pertinent part, as follows:

> Sec. 1(4). "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto; * * * and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divi-

clearly done. Section 1(4) makes it the duty of common carriers by railroad to establish in the first instance, just and reasonable rates and charges, Section 1(5) makes every unjust and unreasonable rate unlawful and Section 1(6) obligates such carriers to establish reasonable regulations and practices. Section 15(1) empowers the Commission to determine and prescribe just and reasonable rates, regulations and practices when carriers fail in their duty to do so. The findings and order of the Commission clearly conform to the standards contained in the statute.

4. Appellants also contend that the Commission's order requiring reinstatement of reciprocal switching

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sions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Sec. 1(5). "All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful."

Sec. 1(6). "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters related to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Sec. 15(1). "That whenever, after full hearing * * * the Commission shall be of the opinion that * * * individual or joint classification, regulation, or practice whatsoever of such carrier * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial * * *, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

causes an involuntary invasion of CNO&TP's terminal facilities in violation of Section 3(5) of the Interstate Commerce Act (49 U.S.C. 3(5))* and no finding was made to support that result. (Juris. St. pp. 16-23).

In view of the nature of the service performed by the CNO&TP it seems clear that the provisions of Section 3(5) are inapplicable. It has already been pointed out that the tarff provisions cancelling reciprocal switching on June 23, 1954, did not close the terminals to switching. Obviously then, Section 3(5) has no application. Moreover, there was no demand on the part of any of the carriers serving Chattanooga to make physical use of the CNO&TP terminals from the standpoint of operating their own switch engines over the CNO&TP's terminal tracks. Under similar circumstances this Court has held that Section 3 is inapplicable. See *Pennsylvania Co.* v. *United States,* 236 U.S. 351, 368-369.

Furthermore, appellants did not rely upon the Section 3(5) issue in the proceedings before the Commission, but on the contrary, in their exceptions to

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* As applicable, Section 3(5) provides as follows:

"If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including mainline track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings."

the Examiner's proposed report filed January 3, 1956, contended that the Examiner had erred in assuming that they relied upon that issue. At page 20 of their exceptions they stated:

> "Southern calls attention to the fact that while this statement [appearing on sheet 3 of the Examiner's report stating that the Commission is asked to require the CNO&TP to permit use of its terminals and tracks at Chattanooga and Boyce by other rail carriers] is not a finding it is incorrect. The only issue with respect to reciprocal switching in the instant proceeding is whether or not the industries on the River track should be given reciprocal switching".

Not having relied upon the Section 3(5) issue before the Commission, appellants are now precluded from raising that issue here. *United States* v. *L. A. Tucker Truck Lines, Inc.*, 344 U. S. 33; *Spiller* v. *Atchison, T. & S.F. R. Co.*, 253 U. S. 117; *United States* v. *Northern Pacific R. Co.*, 288 U. S. 490.

5. Appellants finally contend that the order of the Commission requiring restoration of reciprocal switching at Boyce will deprive them of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States. (Juris. St. p. 5).

This point was not argued by appellants in their Jurisdictional Statement and it is apparent that such a contention is without merit. It has long been held by this Court that depreciation in the value of some business due to otherwise valid regulation is not such a loss of property without due process as would be violative of the Fifth Amendment to the Constitution. See *St. Louis S. W. R. Co.* v. *United States*, 245 U. S. 136, 142; *American Trucking Assns.* v. *United States*, 344 U. S. 298.

CONCLUSION

By reason of the foregoing, it is respectfully submitted that the decision of the District Court below is valid and correct in all respects and that this appeal presents no substantial questions.

WHEREFORE, premises considered, it is prayed that the judgment of the District Court be affirmed.

Respectfully submitted,

JOHN W. ADAMS, JR.
104 St. Francis Street
Mobile 8, Alabama

CHARLES P. REYNOLDS
147 Granby Street
Norfolk 10, Virginia

CLIFFORD T. COOMES
908 W. Broadway
Louisville 1, Kentucky

R. B. CLAYTOR
c/o Norfolk & Western Ry. Co.
Roanoke, Virginia

R. B. GWATHMEY
c/o Atlantic Coast Line R. Co.
Wilmington, N. C.

MARTIN A. MEYER, JR.
Investment Bldg.
Washington, D. C.

WALTER C. SCOTT, JR.
P. O. Box 642
Savannah, Georgia
Attorneys for Railroad Appellees

HITCH, MILLER & BECKMANN
P. O. Box 642
Savannah, Georgia
Of Counsel

PROOF OF SERVICE

I, Walter C. Scott, Jr., one of the attorneys for the Railroad appellees herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2 day of December, 1957, I served copies of the foregoing motion on the other parties hereto, as follows:

(1) On the appellants, by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to—

Messrs. Henry L. Walker
Arthur J. Dixon
James A. Bistline
Southern Railway Building
P.O. Box 1808
Washington 13, D. C.

R. Granville Curry, Esq.
631 Southern Building
Washington, D. C.

(2) On the United States, by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to—

The Solicitor General,
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice

Messrs. James E. Kilday
CHARLES P. ~~Robert E.~~ Esherick
Attorneys
Department of Justice
Washington 25, D. C.

Lester S. Parsons, Jr., Esq.
United States Attorney
For the Eastern District of Virginia
Federal Building
Richmond, Virginia

(3) On the Interstate Commerce Commission, by m
ing a copy in a duly addressed envelope, with air n
postage prepaid, to—

Robert W. Ginnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

(4) On Cramet, Inc., by mailing a copy in a duly
dressed envelope, with air mail postage prepaid to—

Robert N. Burchmore, Esq.
Burchmore, Good and Bobinette
2106 Field Building
Chicago 6, Illinois

Walter C. Scott, Jr.

APPENDIX "A"

Atlanta & Saint Andrews Bay Railway Company
Atlanta and West Point Rail Road Company
Atlantic Coast Line Railroad Company
Central of Georgia Railway Company
Charleston and Western Carolina Railway Company
Georgia Rail Road & Banking Company
(operated as the Georgia Railroad by Lessees:
Atlantic Coast Line Railroad Company and
Louisville and Nashville Railroad Company)
Gulf, Mobile & Ohio Railroad Company
Louisville and Nashville Railroad Company
Macon, Dublin & Savannah Railroad Company
Norfolk & Western Railway Company
Seaboard Air Line Railroad Company
Tennessee, Alabama & Georgia Railway Company
The Virginian Railway Company
The Western Railway of Alabama

APPENDIX "B"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

Civil Action

No. 2432

SOUTHERN RAILWAY COMPANY, ET AL., *Plaintiffs,*

v.

THE UNITED STATES OF AMERICA, ET AL., *Defendants*

This cause, coming on to be heard before the undersigned, constituting a special District Court of three judges, convened in accordance with statute, was submitted for final decree by all parties upon the pleadings, the record made before the Interstate Commerce Commission,

together with a certified copy of the tariff published on November 16, 1956, forming the basis of the counter-claim, and the briefs and arguments of counsel.

The Court finds that the order of the Commission dated May 4, 1956, as amended by subsequent stay orders, is within the scope of the Commission's statutory authority and based upon adequate findings, supported by substantial evidence, and that for reasons set forth in the written opinion filed herewith, that plaintiffs are not entitled to the relief prayed, that the temporary restraining order should be dissolved and that plaintiffs should be ordered to comply promptly with the orders of the Commission as prayed in the counter-claim.

NOW THEREFORE, it is ADJUDGED, ORDERED AND DECREED that the temporary restraining order of November 16, 1956, restraining the Interstate Commerce Commission from enforcing the third ordering paragraph of the order of May 4, 1956, as affirmed by order of October 1, 1956, be and it is hereby dissolved; that plaintiffs' petition for a permanent injunction be and it is hereby denied; that plaintiffs be and they are hereby ordered to comply promptly with the orders of the Commission, as prayed in the counter-claim of the intervening railroad defendants and that the costs hereof be and they are hereby taxed against plaintiffs.

This the 12th day of July, 1957.

/s/ Simon E. Sobeloff
United States Circuit Judge

/s/ Albert V. Bryan
United States District Judge

/s/ Sterling Hutcheson
United States District Judge

APPENDIX "C"

No. 31737

CRAMET, INC

v.

ALABAMA GREAT SOUTHERN RAILROAD COMPANY ET AL.

This proceeding being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, full investigation of the matters and things involved having been made, and said division having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the defendants named in the complaint, according as they participate in the transportation, be, and they are hereby, notified and required to cease and desist, on or before August 10, 1956, and thereafter to abstain, from publishing, demanding, or collecting for the transportation of carload traffic from and to the points designated in the succeeding paragraphs hereof rates which exceed, and practices which differ from, those prescribed in said paragraphs.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act, and thereafter to maintain and apply to the transportation, in carloads, of rutile ore, minimum 80,000 pounds, rates which shall not exceed $8.50 per ton of 2,000 pounds from the Atlantic and Gulf ports embraced herein south of Norfolk, Va., to Chattanooga and Boyce, Tenn., and $9.50 per ton of 2,000 pounds from

Newport News and Norfolk, Va., to the said destinations, plus increases authorized in Ex Parte Nos. 175 and 196.

It is further ordered, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga.

And it is further ordered, That this order in No. 31737 shall continue in full force and effect until the further order of the Commission.

By the Commission, division 2.

HAROLD D. McCOY,
Secretary.

(SEAL)

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 579

SOUTHERN RAILWAY COMPANY and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

and

INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellee.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

December 1957.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 579

SOUTHERN RAILWAY COMPANY and THE CINCINNATI, NEW ORLEANS AND TEXAS PACIFIC RAILWAY COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,
and
INTERSTATE COMMERCE COMMISSION, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Appellee Cramet Inc. moves pursuant to Rule 16(e) of the revised rules of this Court that the final judgment of the court below be affirmed.

This is an action to set aside a portion of an order of the Interstate Commerce Commission entered in its Docket

No. 31737, *Cramet Inc.* v. *Alabama Great Southern Railroad Company, et al.*, and companion cases, I. & S. Docket No. 6284, *Rutile Ore—Gulf and South Atlantic Ports to Tennessee*, and Docket No. 31677, *Central of Georgia Railway Company* v. *Cincinnati, New Orleans & Texas Pacific Railway Company*. 298 I.C.C. 439. The three-judge district court dismissed the complaint and this is a direct appeal from the final judgment of the court below.

The complaint of appellant assailed only that portion of the Commission's order bearing upon the practice of reciprocal switching. Throughout its jurisdictional statement appellant treats this matter as if it were completely separate and distinct from the rest of the case. The record shows, however, that the reciprocal switching tariff of appellant is ingeniously and inextricably expressed in terms of rates and routes. We therefore submit the following statement of the issues as revealed by the whole record.

STATEMENT

For more than fifty years all of the railroads serving Chattanooga, Tenn., including the appellant, have voluntarily maintained and still maintain generally unrestricted routing on all categories of freight moving to and from the Chattanooga district. In addition, it has been the invariable practice for many years of all railroads serving Chattanooga, including appellant, to provide in their terminal tariffs a switching charge for which they perform the service of switching any freight between the points of interchange with their connections and the site of any industry located on any one such railroad. This charge is absorbed by the connecting line-haul carrier out of the through rate paid by the shipper. This practice, commonly referred to

as reciprocal switching, extends throughout the so-called Chattanooga switching district. (Tr. 17-21; 67-85; 87-90; 100-103; 115-8).

By virtue of these practices, each industry in the district, although physically located on the tracks of only one railroad, enjoys the same service and competitive position as if it were actually reached by the rails of every road serving the district. Shippers at Chattanooga thereby enjoy the privilege of shipping without rate penalty over any one of existing competition routes without regard to whether such route includes the long haul of any particular carrier participating therein. (298 I.C.C. 447).

The plant site of this appellee, Cramet Inc., together with that of Central Soya Company and other industries, is located in the unincorporated community of Boyce, Tenn., lying adjacent to Chattanooga. These industries are served by a switch track of appellant and are less than one mile from its main switching yard at Chattanooga; the switching service involved is much less than that which is performed in connection with other and more distant industries within the switching district. (Exh. 8). The Boyce area generally has been included in the Chattanooga switching district for more than forty years and this fact was made known to appellee by the representatives of appellant and was a controlling factor in the choice of appellee's plant site in 1953. (Tr. 147-68; 179-81; 236-47).

Upon selection of the Boyce site by appellee, and before the construction of its 25 million dollar titanium plant was complete, appellant amended its terminal tariff in respect of switching to and from Boyce industries. (Tr. 24-6). By its terms, the amendment did not purport to cancel existing routes, but affected only the application of

the rates; it expressly maintained the inclusion within the switching limits of industries and locations on the line of appellant at Boyce.[1] The Commission permitted the amendment to take effect, over protest, on June 23, 1954.

When the amended provision of its terminal tariff had taken effect, appellant began immediately to make use of that provision as a foundation for commercially closing the long established and normal, competitive routes of other carriers so far as Boyce alone was concerned. Accordingly, when the plant of Cramet was ready to begin operation

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[1] The new tariff provision of appellant's terminal tariff is set forth in the Appendix to the Commission's report, as follows, 298 I.C.C. 449:

Item 15. Application of Rates to and from Industries and Locations at Boyce, Tenn.

(1) The CNO & TP Ry. Co. will not switch carload traffic between Chattanooga, Tenn., and Boyce, Tenn., except as provided in paragraph (2) of this item.

(2) (a) Industries and locations on the CNO & TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga, Tenn., switching limits, and the CNO & TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

(b) Where there is an applicable commodity rate or mileage scale rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same commodity rate or mileage scale rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn., or

(c) When there is an applicable class rate in effect to or from (as the case may be) Chattanooga, Tenn., and the same class rate is not in effect via any line or route to or from (as the case may be) Boyce, Tenn.

and applied for a reasonable line-haul rate for a large movement of imported rutile ore from the southern ports to Boyce, appellant published line-haul rate tariffs restricting such rates to its long-haul routes from the ports. That proposal was suspended by the Commission upon protest in I. & S. Docket 6284, which was one of the combined proceedings involved in this case. (298 I.C.C. 442).

Thereupon, the appellee Central of Georgia complained in Docket 31677 against the attempt of appellant to exclude Central from participation in the routes by refusing to join with it in rates equal to those proposed over appellant's long-haul routes. Cramet complained in Docket 31737 against the failure of all participating carriers to provide lawful rates on rutile ore, and in particular against appellant's entire program of monopolizing the Cramet plant through the combined cancellation of switching charges and restriction of routes in tariffs of line-haul rates. Cramet sought an order requiring the restoration of a complete service of reciprocal switching at Boyce and the maintenance of lawful and reasonable rates on all freight traffic to and from Boyce, such rates to be no higher over any existing route than over any one route; Cramet also sought the prescription of lawful rates on rutile ore and reparation for the unreasonable rates paid on its movement of ore *pendente lite*. (298 I.C.C. 440).

Full hearing was held by the Commission, at which substantial evidence was adduced concerning the reasonableness and effect upon the public interest of reciprocal switching practices, past and present, in the affected area. (Tr. 177-9; 204-6; 217-23; 259-65).

The entire Commission adopted the final order of its Division 2 and underlying recommendation of its hearing examiner. It found that the proposed cancellation of routes in connection with the reduced rates on rutile ore was not shown to be consistent with the public interest and that the refusal of appellant to participate in rates over all existing routes to Boyce the same as those proposed for application over its long-haul route was unjust and unreasonable. It prescribed reasonable rates on rutile ore and required the railroads to pay reparation for the excess charges paid by Cramet on past shipments. Finally, the Commission held that the refusal of appellant to treat Boyce as a point entitled to switching service at a switching charge, and the maintenance of a tariff provision resulting in rates to or from Boyce that were higher when the routing was over competing routes than when it was over the long-haul routes of the defendant was unjust and unreasonable. (Juris. St. App. B-C; Complaint App. D).

ARGUMENT IN SUPPORT OF MOTION

Appellant has appealed only from that portion of the Commission's order which requires the restoration of a complete reciprocal switching service to and from Boyce, the same as throughout the Chattanooga district, and the same as was voluntarily maintained by appellant at Boyce for many years prior to June 1954; such service still is maintained at Boyce depending only on whether a line-haul rate exists to or from Chattanooga which is not in effect to Boyce via the long-haul route of appellant. Appellant urges on this appeal that the order is contrary to the

short-hauling provisions of section 15(4);[2] that it requires compulsory use of appellant's terminals without the req-

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[2] Sec. 15(4) [49 U.S.C., § 15(4)] provides as follows:

In establishing any such through route the Commission shall not (except as provided in section 3, and except where one of the carriers is a water line) require any carrier by railroad, without its consent, to embrace in such route substantially less than the entire length of its railroad and of any intermediate railroad operated in conjunction and under a common management or control therewith, which lies between the termini of such proposed through route, (a) unless such inclusion of lines would make the through route unreasonably long as compared with another practicable through route which could otherwise be established, or (b) unless the Commission finds that the through route proposed to be established is needed in order to provide adequate, and more efficient or more economic, transportation: *Provided, however,* That in prescribing through routes the Commission shall, so far as is consistent with the public interest, and subject to the foregoing limitations in clauses (a) and (b), give reasonable preference to the carrier by railroad which originates the traffic. No through route and joint rates applicable thereto shall be established by the Commission for the purpose of assisting any carrier that would participate therein to meet its financial needs. In time of shortage of equipment, congestion of traffic, or other emergency declared by the Commission, it may (either upon complaint or upon its own initiative without complaint, at once, if it so orders, without answer or other formal pleadings by the interested carrier or carriers, and with or without notice, hearing, or the making or filing of a report, according as the Commission may determine) establish temporarily such through routes as in its opinion are necessary or desirable in the public interest.

nisite findings under section 3(5);[3] and that it is not supported by adequate findings and sufficient evidence. It is submitted that under the circumstances of the case the questions presented are so unsubstantial as not to require further argument.

The short-hauling question

It is submitted that the Commission's order is not contrary to section 15(4) or section 3(5) because it does not establish through routes. *United States* v. *Great North-*

[3] Sec. 3(5) [49 U.S.C. § 3(5)] provides as follows:

If the Commission finds it to be in the public interest and to be practicable, without substantially impairing the ability of a common carrier by railroad owning or entitled to the enjoyment of terminal facilities to handle its own business, it shall have power by order to require the use of any such terminal facilities, including main-line track or tracks for a reasonable distance outside of such terminal, of any common carrier by railroad, by another such carrier or other such carriers, on such terms and for such compensation as the carriers affected may agree upon, or, in the event of a failure to agree, as the Commission may fix as just and reasonable for the use so required, to be ascertained on the principle controlling compensation in condemnation proceedings. Such compensation shall be paid or adequately secured before the enjoyment of the use may be commenced. If under this paragraph the use of such terminal facilities of any carrier is required to be given to another carrier or other carriers, and the carrier whose terminal facilities are required to be so used is not satisfied with the terms fixed for such use, or if the amount of compensation so fixed is not duly and promptly paid, the carrier whose terminal facilities have thus been required to be given to another carrier or other carriers shall be entitled to recover, by suit or action against such other carrier or carriers, proper damages for any injuries sustained by it as the result of compliance with such requirement, or just compensation for such use, or both, as the case may be.

ern Railway Co., 343 U.S. 562 (1951). *Virginian R. Co. v. United States*, 272 U.S. 658 (1926).

Appellant argues that the effect of reciprocal switching is to deprive it of its haul between Chattanooga and Boyce as an independent carrier receiving a division of the through joint rates and require it to perform the service as an agent of the line-haul carrier for a lower switching charge. (Juris. St. 16). The matter is essentially one of rates and charges, and does not constitute the establishment of routes. Appellant frankly states that "the physical service would be the same between Chattanooga and the Boyce industries" whether under joint rates or reciprocal switching, (Juris. St. 20).

In this situation it is submitted that the matter was settled by this Court in the *Great Northern* case, wherein the court said (343 U.S. 575):

> But the provisions of § 15(4)—the restrictions against short hauling, the financial needs prohibition and the emergency route provision—all deal with the Commission's power to establish through routes • • • where, as here, the Commission did not establish through routes, § 15(4) has no application.

Even though the physical service remains the same, appellant appears to argue that the Commission is bound by 15(4) when it deals with the reciprocal switching provisions of appellant's terminal tariff because those provisions took effect without suspension. It is not clear whether appellant proceeds on the theory that the effect of its new tariff provision was to cancel routes or close its terminals. Clearly, however, the tariff does not purport in and of itself to accomplish either result. Instead, it provides that:

> Industries and locations on the CNO & TP Ry. Co. at Boyce, Tenn., are included in the Chattanooga,

> Tenn., switching limits, and the CNO & TP Ry. Co. will switch carload traffic between said industries and locations and points of interchange with connecting lines at Chattanooga, Tenn., only to the extent provided in subparagraphs (b) and (c) of this item.

The condition under which the switching charge will apply, as set forth in subparagraphs (b) and (c) of the tariff provision, is expressed in terms of application of rates; it is made to depend upon the existence of *different* line-haul rates via appellant's route to or from Boyce from the rates to or from Chattanooga. Under that provision, therefore, reciprocal switching is not eliminated, but is made to depend upon the line-haul rates and routes.

It is conceded on both sides that the existing line-haul rates provided in the tariffs of all carriers are generally the same to and from Boyce as to and from Chattanooga. The combined effect of that situation and the precise provisions of appellant's terminal tariff provision would be to render inapplicable the reciprocal switching charge. But that does not mean that reciprocal switching was completely cancelled or that appellant's terminal was irrevocably closed by the amendment in question. For the provision is that the application of the switching charge depends on the condition of the rate tariffs of all carriers, over some of which appellant has control and over some of which it does not. Presumably, appellant intended and intends to make rates over its own routes the same to or from Boyce as any other carrier might provide to or from Chattanooga, so as to avoid reciprocal switching under its amended terminal tariff. However, as to rates from or to any origin or destination that is local to the line of a railroad other than appellant, appellant would not, without the agreement of such other carrier have the power to put into effect a rate between such origin or destination on the one hand, and Boyce on the other hand, equal to the rate that such

other carrier might provide to or from Chattanooga. Absent such agreement (which in view of the dispute among carriers cannot be assumed) the reciprocal switching charge applies by the strict terms of appellant's own tariff. If this reasoning is involved, it is caused by the devious phraseology of appellant's tariff. The legal significance of the facts is that the routes and terminals are open and the Commission was not bound by Section 3(5) or 15(4). It is submitted that a patently adroit tariff should not be held to lend substance to an appeal when the court below, the commission, its division, and the hearing examiner, all pierced the veil of tariff subtleties with unerring expertise.

This court held in the *Virginian Railway* case that the practical closing of routes by virtue of the amount and character of the rates did not effect the power of the Commission to deal with the rates over such routes without complying with the short-hauling requirements. The court there said (272 U.S. 666):

> Through routes to the West were already in existence. And there were through rates by combination. (Citations) The fact that the combination rates were excessive constituted the only obstacle to the movement.

That the Commission was in fact dealing with rates and practices is finally demonstrated by the terms of the assailed order. The third ordering paragraph, which alone is involved in this appeal, as follows (Juris. St. App. C):

> *It is further ordered*, That said defendants, according as they participate in the transportation, be, and they are hereby, notified and required to establish, on or before August 10, 1956, upon not less than 30 days' notice to this Commission and to the general public by filing and posting in the manner prescribed in section 6 of the Interstate Commerce Act and thereafter to maintain and apply to the transportation of carload

traffic requiring switching over the rails of the defendant Cincinnati, New Orleans and Texas Pacific Railway Company from Chattanooga, Tenn., to Boyce, Tenn., or in the reverse direction, switching charges, and provisions relating thereto, that will result in the maintenance of rates and charges, when the line-haul routing is over lines other than the defendant, that are the same as those applicable when the routing embraces the defendant as a line-haul carrier to or from Chattanooga.

Adequacy of the findings

It is submitted that the Commission did not establish through routes or require the compulsory use of terminals within the meaning of sections 3 and 15. Instead, it is clear that its order with respect to reciprocal switching was made pursuant to section 15(1) upon the basis of findings under sections 1(4), and 1(6) (49 U.S.C. 1(4), 1(6) and 15(1)).[4]

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[4] Section 1(4), 1(6) and 15(1) provide in pertinent part, as follows:

Sec. 1(4). "It shall be the duty of every common carrier subject to this part to provide and furnish transportation upon reasonable request therefor, and to establish reasonable through routes with other such carriers, and just and reasonable rates, fares, charges, and classifications applicable thereto. It shall be the duty of every such common carrier establishing through routes to provide reasonable facilities for operating such routes and to make reasonable rules and regulations with respect to their operation, and providing for reasonable compensation to those entitled thereto; and in case of joint rates, fares, or charges, to establish just, reasonable, and equitable divisions thereof, which shall not unduly prefer or prejudice any of such participating carriers."

Sec. 1(6). "It is hereby made the duty of all common carriers * * * to establish, observe, and enforce * * * just

Accordingly, the Commission found with respect to reciprocal switching (298 I.C.C. 448):

> In No. 31737, we find that the refusal of the Southern to treat Boyce as a point entitled to switching service from and to Chattanooga at a switching charge, and the maintenance of a provision which results in rates and charges on traffic to or from Boyce when the line-haul routing to or from Chattanooga is over lines other than those of the defendant, higher than those applicable when the routing embraces the defendants as a line-haul carrier to or from Chattanooga, is unjust and unreasonable.

The foregoing ultimate finding under section 1 was made pursuant to subsidiary findings in the Commission's re-

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(footnote four continued)
and reasonable regulations and practices affecting * * * the facilities for transportation * * * and all other matters related to or connected with the receiving, handling, transporting, storing, and delivery of property subject to the provisions of this part which may be necessary or proper to secure the safe and prompt receipt, handling, transportation, and delivery of property subject to the provisions of this part upon just and reasonable terms, and every unjust and unreasonable classification, regulation, and practice is prohibited and declared to be unlawful."

Sec. 15(1). "That whenever, after full hearing * * * the Commission shall be of the opinion that any individual or joint rate, fare, or charge whatsoever * * * or that any individual or joint classification, regulation, or practice whatsoever of such carrier * * * is or will be unjust or unreasonable, or unjustly discriminatory or unduly preferential or prejudicial * * *, the Commission is hereby authorized and empowered to determine and prescribe what will be the just and reasonable * * * regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed * * *."

port of which the following is of particular significance in view of the argument made by appellant (298 I.C.C. 447):

> The Southern contends that Cramet will suffer no injury from a restriction of these movements to its single-line routes, since it provides superior service. This would deny to this complainant the benefit of a switching service at a switching charge and deprive it of competitive service to and from Chattanooga. The issue here is similar to that considered in *Agricultural Products Co.* v. *Atchison, T. & S. F. Ry. Co.*, 284 I.C.C. 505, wherein division 2 found that the practice of the defendant Southern Pacific Company in refusing to place within the Phoenix, Ariz., switching district tracks served by that defendant in the vicinity of Tovrea, Ariz., was unjust, unreasonable, and unduly prejudicial and preferential.

The appellant quotes a portion of the foregoing finding and states that "The finding has reference to proposed rutile-ore rates restricted to apply over 'single-line routes' of the Southern System". (Juris. St. 17). Appellant, we submit, misconstrues the finding, and it is clear from a reading of the entire finding that the Commission was not dealing merely with routes on rutile ore, but with the effect of reciprocal switching.

In this connection, appellant seeks to distinguish the *Agricultural Products* case cited by the Commission, on the ground that in that case the Commission made an undue prejudice finding under section 3 as well as under section 1 (Juris. St. 20). However, in *Agricultural Products* the Commission was requiring the enlargement of a switching district and the inclusion of tracks that had not theretofore been included by voluntary action of the carrier, for which a section 3 finding may be requisite. *Pennsylvania Co.* v. *United States*, 236 U.S. 351 (1915). In the case at bar, the Commission was not establishing reciprocal switching, but

was prescribing a reasonable provision with respect thereto. It is clear from the provisions of section 15(1) quoted above that the requisite findings in such a case may be either under section 1 or section 3 and not necessarily both. That section confers authority over any carrier action which "is or will be unjust or unreasonable or unjustly discriminatory or unduly preferential or prejudicial".

CONCLUSION

Throughout the proceeding before the Commission, appellant urged that separate consideration must be given to the matters of switching rates, routes, and line-haul rates on rutile ore. In its petition for reconsideration and reargument before the entire Commission of the final report of Division 2, it insisted:

> "If the issue of the proposed restricted routes on rutile are disregarded, it is emphasized that all railroads serving Chattanooga are in a position to publish rates that will apply to Boyce." (page 8)
>
> "Consequently, if the issue of restricted routes is not considered, there is no testimony of evidentiary value in this case on behalf of the intervening railroads in connection with the establishment of reciprocal switching at Boyce." (page 10)
>
> "This Commission has the duty to weigh very carefully the testimony of the witnesses for Cramet and Central Soya on the issue of reciprocal switching only and not in conjunction with their testimony on restricted routes." (page 11)
>
> "Other than on the proposed restricted rate on rutile ore, these industries can ship or receive traffic over any of the lines serving Chattanooga." (page 17)

Appellant has pursued in court the same effort to treat the matter of switching as if it were unrelated to rates and routes, whereas the terms of appellant's terminal tariff are inextricably commingled with the rates and routes. In real purpose and effect therefore, this action and appeal are presented in a manner contrary to section 10(e) of the Administrative Procedure Act [5 U.S.C. 1009(e)], which provides that the court shall review the whole record.

WHEREFORE, appellee submits that the questions submitted on this appeal are so unsubstantial as not to require further argument and that the judgment of the court below should be affirmed.

Respectfully submitted,

JOHN S. BURCHMORE,
ROBERT N. BURCHMORE,
Attorneys for Appellee.

BURCHMORE, GOOD & BOBINETTE,
2106 Field Building,
Chicago 3, Illinois,
Of Counsel.

December 1957.

PROOF OF SERVICE

I, Robert N. Burchmore, attorney for appellee Cramet Inc., and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6th day of December, 1957, I served copies of the foregoing motion on the other parties hereto, as follows:

(1) On the appellants, by mailing a copy in a duly addressed envelope with air-mail postage prepaid, to:

Messrs. Henry L. Walker
Arthur J. Dixon
James A. Bistline
Southern Railway Building
P. O. Box 1808
Washington 13, D. C.

R. Granville Curry, Esq.
631 Southern Building,
Washington, D. C.

(2) On the United States, by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to:

The Solicitor General
Department of Justice
Washington 25, D. C.

Victor R. Hansen, Esq.
Assistant Attorney General
Department of Justice

Messrs. James E. Kilday
Charles E. Esherick
Attorneys
Department of Justice
Washington 25, D. C.

Lester S. Parsons, Jr., Esq.
United States Attorney
For the Eastern District of Virginia
Federal Building
Richmond, Virginia

(3) On the Interstate Commerce Commission, by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to:

Robert W. Guinnane, Esq.
General Counsel
Interstate Commerce Commission
Washington 25, D. C.

Samuel R. Howell, Esq.
Associate General Counsel
Interstate Commerce Commission
Washington 25, D. C.

(4) On railroad appellees, by mailing a copy in a duly addressed envelope, with air-mail postage prepaid, to:

Walter C. Scott, Jr., Esq.
P. O. Box 642
Savannah, Georgia

ROBERT N. BURCHMORE